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THE UNIVERSITY OF ALBERTA

THE LEGAL STATUS OF THE  
CANADIAN PUBLIC SCHOOL BOARD

A DISSERTATION  
SUBMITTED TO THE FACULTY OF GRADUATE STUDIES  
IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE  
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by

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## ABSTRACT

In law the school board is a statutory corporation created by the legislature, and therefore subject to the will of the legislature. It derives its powers from the statute which creates it, and has its duties imposed upon it by that statute. As a corporation the board has limited powers and duties, and it is subject to the same provisions of the common law as are other statutory corporations.

Because the legislature has assigned related functions, and because they represent closely related constituencies, the school board and municipal council must work together cooperatively. Neither has power to interfere in the affairs of the other. Within the limits of its own authority the school board is supreme. Where the statutes assign ministerial functions to the municipality, to be carried out on the requisition of the school board, the council has no discretion. The Courts have stated in their judgments that in its relations with the municipal council, the board is subject to control by the council only to the extent specifically provided by statute.

The financial powers of the school board, as are all other powers, are subject to statutory provisions. Therefore requisitions, borrowing and expenditure must be carried out in strict accordance with those provisions.

Statutes grant children in all provinces a right to education, and by the same token, impose an obligation to provide educational facilities and services on the school board. Neither the right nor the obligation is absolute, but rather is subject to the limitations and



exceptions set by the legislature. However, the board has no power to interfere with a child's right to education and therefore must meet its obligation without discrimination against children under its jurisdiction.

Because schools have been centralized, the added duty of conveying pupils has been imposed upon school boards. The risk of injury to pupils being conveyed places the further duty to exercise adequate care upon the board. The board is held responsible for the negligent acts of its servants, and where the duty to convey children is a statutory one, also for the acts of independent contractors. Boards do, however, have some discretion in the manner in which they will conduct school transportation, and as long as they exercise their powers in good faith, without discrimination, and in the public interest, the Courts do not interfere.

In providing school facilities boards are required to follow statutory procedures. Acquisition or change of site, expropriation of lands, or provision of temporary accommodation, are within the powers of the board, and its actions cannot be set aside if it observes the requirements of the statute.

School boards carry out many of their duties by contracting with other persons. However, the subject matter of contracts is controlled by statute. It has been held that the board may not contract obligations beyond the extent of the finances which have been arranged beforehand. The corporation, rather than the individual trustee, is liable in contract, though contracts which are ultra vires, or those which have been reached through irregular procedures, cannot





be enforced by or against the corporation.

School board operation may give rise to legal liability. For the most part it is the corporation which is liable both in contract or in tort. Nevertheless, individual trustees may become liable personally if they violate the provisions of the statutes, act in bad faith or exercise their powers unlawfully or abusively.

Although its powers and authority are restricted by statute, the school board has more authority and may exercise its powers more vigorously than many trustees seem to realize. The board is an agency of the legislature in carrying out the educational program of the province. Therefore, in discharging its duties it may take full advantage of the provisions of law. In fact, if it is to administer effectively, the board must assert itself forcefully and decisively. Education is much too important to receive second-rate consideration.



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## CHAPTER I

### INTRODUCTION

Practice in the field of school administration must give some consideration to the law as it relates to the administrative agency, its organization, its authority and its duties. Administrative procedures, no matter how carefully planned, and desirable they may be, cannot be employed unless they fall within the legal jurisdiction of the agency which proposes to implement them. School operation and maintenance, the provision of buildings, grounds, facilities and instructional staff; pupil control, transportation and supervision; personnel policies; finance--all have legal implications and must be conducted in keeping with the statutory provisions that control them.

The school board, an elected or appointed body, is an agency of local government, and together with its officers, forms a part of the whole pattern of government organization and intergovernmental relationships. It has a clear relation to local municipal governments, to provincial governments and legislatures, and broadly speaking, also to the federal government. The board is created by provincial legislation authorized by the federal constitution or by federal legislation which is constitutional in nature, and as such finds its powers and duties delimited by school laws. But it also finds itself subject to a large body of legal rules and principles established by courts of law and embodied in the common law and equity.

Almost every school board decision has some legal implication, whether it be in the area of school finance, building contracts, pupil control, conveyance or personnel relations. The question of the board's



authority to do an act, its duty to perform it, or its legal consequences must be considered. For full understanding of such legal implications it is necessary to examine broadly the sources of authority and the legal framework within which the board functions.

The structure and operation of Canadian public school systems derives chiefly from five sources:

- (a) The constitutional provisions laid down by the B. N. A. Act of 1867, and the subsequent Acts of Union and Orders-in-Council admitting the provinces to the Canadian confederation after 1867;
- (b) The statutes enacted by the legislatures of the provinces of Canada;
- (c) The administrative rules and regulations of the provincial departments of education;
- (d) The rules and regulations of local school boards enacted through resolution or by-law of the board;
- (e) The decisions of the Courts in litigation brought before them.

The school administrator should be broadly informed on all of these sources of authority and regulation. It is evident, however, that the first four are more fully understood than the last. The writer, therefore, examines the work of the Courts in setting the operational pattern of the schools and keeping it in harmony with social progress and change. Although consideration in this study is being limited mainly to the decisions of the Courts, it is well to examine briefly the first four factors, to clarify the relationships among all of them.



## The Constitution

A constitution has been defined as:

The supreme organic and fundamental law of a nation or state, establishing the character and conception of its government, laying the basic principles to which its internal life is to be conformed, organizing the government and regulating, distributing and limiting the functions of its different departments, and prescribing the extent and manner of the exercise of sovereign powers.<sup>1</sup>

A nation's constitution may be largely written and preserved in documentary form, largely unwritten and preserved in traditional and customary usage as exemplified by Court precedents and social practice, or it may be a combination of both--partly written and partly unwritten.

The constitution of the United States is an example of the first type. In written form it insures a high degree of permanence in the basic rights and principles which it lays down. Although amendments to such a constitution are possible, a nation does not tamper lightly with its fundamental law and therefore a written constitution guarantees a high degree of stability. By the same token, however, in time of rapid or fundamental social change, it may represent an undesirable amount of rigidity which makes it difficult to keep the practice of government in harmony with social trends. When this happens, the Courts must assume the grave responsibility of attempting to interpret the meanings of constitutional provisions so as to bring them into line with current belief and practice. Inevitably such interpretation leads to the accumulation of a body of legal precedent which must be read together with the original documents and amendments for complete knowledge of the constitution.

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<sup>1</sup>M. K. Remmlein, School Law. New York: McGraw-Hill Book Co. Inc. 1950, p. 361.





The British constitution, as an example of the second type, is largely unwritten and depends mainly upon the body of legal precedent accumulated over the years. Such a constitution is more flexible and more easily adjusted to changes in social and political outlook than is a written one. As social values are modified, the Courts can keep their decisions in harmony with them without the parliament's initiating the difficult task of constitutional amendment. A certain danger of instability lies in the lack of fixed and written guidelines, however, and therefore a constitution of this type can be effective only in a society or nation with a high degree of social and political stability, where custom and tradition are sufficiently meaningful to be regarded as sound guides, and where regard for them is part of the national character.

The Canadian constitution represents a compromise between the two extremes cited. Although the British tradition of common law is very strong in Canada, the young nation with an extremely heterogeneous population, unique geography and socio-political pattern, could not entrust its supreme law to a completely unwritten form. Thus Canada has a constitution partly written in the B.N.A. Act and its amendments, and partly unwritten in English common law.

In a federal democracy such as Canada, the national constitution distributes the powers between the federal and provincial governments. In Canada this is the case in so far as constitutional provisions for the four original provinces of the union in 1867 are concerned. These provisions were set forth by Act of the British parliament. Subsequent admission of the British colonies of British Columbia, Prince Edward Island and Newfoundland was by order-in-council of the British government. For these provinces, and for the federal authority itself, the





constitutional law is either a statute of the British parliament or an order of the British government. The admission of the prairie provinces to the union and the setting of their constitutions, however, was by Act of the Canadian parliament.

Thus constitutional relationships are largely matters of legal jurisdiction. A statute of a government of higher authority may serve as the constitution of one of lower authority. Statutes of the federal parliament may form part of the constitution of a provincial government, and statutes of the provincial legislature may form the constitution of a local government. No local government may make laws or regulations falling outside the powers granted by the provincial statute and no provincial legislature may make laws falling outside the framework established by federal statute setting provincial constitutions or the B.N.A. Act, 1867 and its amendments.

In educational matters the B.N.A. Act specifically assigns exclusive rights and powers to the provinces. The only exception is that in guaranteeing specifically named educational rights of certain religious minorities, the redress of wrongs which these minorities might suffer as a result of provincial legislation is reserved to the federal government. The several Acts of Union of other provinces with Canada contain substantially the same provisions regarding education as are stated in the B.N.A. Act with the exception that in Newfoundland recourse is to the Courts rather than to the federal government in matters of dispute over the educational rights of denominational groups. In effect, this procedure also applies in the other provinces, no appeal having been taken to the federal government since the settlement of the Manitoba Separate School question.



Statutes of Provincial Legislatures

Having received virtually complete authority in educational matters, the provinces had the theoretical right either to establish or not to establish educational systems. In practice, at the time that these rights were granted the provinces, educational systems were already in existence and legislatures could hardly have eliminated them. All provinces have thus enacted legislation dealing with education. Once having activated this power, they have assumed full legal responsibility for education. In so doing, provincial legislatures had free choice regarding the type of public school system they would adopt. They were free to set up completely centralized or completely decentralized systems. For various reasons they chose to implement systems which were partly centralized and partly decentralized. Centralized functions were placed into the administrative charge of departments of education, while decentralized functions were delegated to locally elected or appointed school boards. Such delegation, however, does not relieve the province of its ultimate responsibility.<sup>2</sup>

Provincial School Acts set the broad framework within which departments of education and school boards function. They establish the structure of the educational system and much of its operation by specific mandates and prohibitions. However, no law can prescribe completely. It cannot anticipate every eventuality, nor provide specifically in advance for all problems which may arise. Consequently a considerable degree of permissiveness exists in the provincial statutes relating to departments of education and to local school boards. These

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<sup>2</sup>See McLeod v. Salmon Arm School Trustees, pp.195-201,infra.



agencies may perform their assigned duties as they see fit, being restricted only by the limitations laid down by the legislature. Thus their authority is limited by provincial statute, which is their constitution.

### Departmentsof Education

In carrying out their delegated responsibilities departments of education make administrative rules and regulations. These may pertain to such things as teacher certification, curriculum, school grants or school buildings. The effect of departmental rules and regulations is generally well understood for they govern to a large extent the day by day operation of schools. If a department acts outside its delegated or implied powers, the rule or regulation is void. Authority is presumed, however, and until challenged and overruled in a court of law, all rules and regulations are considered valid and have effectiveness to that of a statute of the legislature.<sup>3</sup>

### Local School Boards

School boards too are created by the provincial legislatures to carry out certain delegated duties, and they are therefore subject to the will of the legislature. To carry out their duties they must follow the prescribed procedures as set out in the respective School Acts, and may exercise only those powers granted by law. However, permissive

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<sup>3</sup>M. K. Remmlein, Op. Cit., p. 3.





sections of the Acts, and sometimes vagueness in wording or meaning, necessitates the exercise of broad discretion. Thus within the limits of its authority the board is a local government body which not only legislates, but also administers both its own regulations and those of the department and the legislature. Its own rules and regulations have the full force of law and must be considered valid until challenged in the Courts.

#### Preliminary Consideration of the Law and the Courts

As has been suggested, the implications for education of the national constitution, the statutes of the legislatures and the regulations of departments of education and of school boards are fairly well understood by educational administrators. Not so well understood is the function of the Courts. The national constitution and provincial legislation establish the general framework within which departments and boards function. The framework does not spell out all the details of operation and therefore leaves extensive discretionary powers. The exercise of these powers by school boards may bring various relationships into conflict and the Courts must rule on such matters as the following:

Matters of Jurisdiction: The Courts must decide whether a board's regulation or resolution is intra vires or ultra vires of the board. The Courts must determine whether the board acted within its powers or took action beyond its rights in dealing with ratepayers, employees, school children or other government agencies.

Interpreting Legislation: The Courts must clarify the meaning





of legislation or the intent of the legislature when these are brought into question.

The board by exercising its delegated powers in the discharge of its duties must not do so negligently or abusively. The Courts must protect the individual from the unlawful use of official power. When legislation does not cover a particular set of circumstances, the rights of parties must be decided on the basis of general principles developed and handed down over many years. A judicial interpretation of school law is the origin of a legal principle, and until it is overruled by a Court of superior jurisdiction, it stands as a precedent. The more cases decided on the basis of this precedent, the firmer becomes the principle which it establishes. Therefore, the accumulation of judicial decisions regarding educational issues serves as a set of legal principles to guide school officials and other personnel in the performance of their duties.<sup>4</sup>

#### The Purpose of this Study.

From the preceding discussion it becomes increasingly apparent that the legal aspects of school operation are not to be found in statutes alone. Of at least equal importance are the findings of the Courts as set forth in their decisions and accumulated in judicial precedents. Although public education derives its structure from constitutional and statutory enactments, it gets a large measure of its operational pattern from the principles formulated in Court decisions. When statutes are

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<sup>4</sup>E. C. Bolmeier, "Directions in School Law," American School Board Journal, CXXXIX (Sept., 1959) pp. 33-35.



silent, vague or permissive on operational matters, school boards must act in their own discretion. Whether or not an action is legal may be difficult to determine without a Court interpretation. It is possible, however, to study case law to discover earlier pronouncements of the Courts on the discretionary acts of school boards and from such a study to draw guiding principles for present and future board action.

The purpose of this study, therefore, is to attempt to derive from an examination of case law and the pertinent statutes such general principles as may assist school boards in their operation. The writer has attempted thereby to clarify and define the legal status of Canadian public school boards. The study brings together Canadian Court decisions relating to school boards, so that they may be of greater use to school administrators. Emphasis is placed on the application of statute law and the common law to the corporate actions and existence of the board.

### Need for the Study

Because public schools are the creations of the law, and because the rights, duties, privileges and immunities involved in their administration are circumscribed by law, there is a legal ingredient in almost every decision boards make. In some instances the legal element is critical. The need for some degree of legal literacy of administrators is clearly indicated. In spite of its importance, however, no aspect of public school administration is so neglected as the relationship of education to the law. Generally three attitudes prevail among administrators. First, they may be naively oblivious to all legal aspects. Because there has been no recent legal trouble, some administrators disregard the importance of a knowledge of law. Secondly, they may



fear the law because of unfamiliarity with it. Finally, they may have an exaggerated delusion of knowledge regarding the legal aspects of education.<sup>5</sup>

None of these attitudes is sound in interpreting the effect of law on educational administration. School administrators do not need to become legal specialists. For legal advice they should retain competent solicitors. Rather they should attempt to gain broad appreciation and general knowledge of legal procedures and the overarching principles of law, to be able to understand more fully the implications of their proposed programs. This will necessitate more than just knowledge of a provincial School Act. As has been shown, school law is not confined to the School Acts, and it is not static to be learned once and for all. School law changes constantly through revision of legislation and through judicial rulings. New issues are frequently being resolved and old precedents are being superseded. Bolmeier<sup>6</sup> states clearly the central reason for becoming familiar with the law as it applies to education:

The amount of litigation involving school law cases is increasing steadily as public education itself continues to increase in scope. The increase is particularly apparent and significant in the field of school management.

It may be concluded, therefore, that school officials should familiarize themselves with the legal principles growing out of judicial opinions so that they may be better guided in the performance of their duties.

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<sup>5</sup>E. E. Reuter, "Essentials of School Law for Administrators," Teachers College Record, LIX (May, 1958) pp. 441-49.

<sup>6</sup>E. C. Bolmeier, Loc. Cit.





### Delimitation and Organization of the Study

This dissertation is not a legal treatise. Rather it is an attempt to examine school law in layman's terms, and to draw from it principles which may help the administrator to work more effectively. There has been no attempt to search and compare educational legislation of the Canadian provinces. Neither has there been any effort to trace the historical evolution of Canadian school statutes. To be sure, as occasion and development of the study demand, elements of both these factors are included, but they are incidental to the main purpose of the investigation. The statutes themselves are available to all and their reproduction here could serve no useful purpose. There has been no effort to interpret statutory provisions except in so far as they may have come under consideration by the Courts. Not all parts of provincial school legislation have come before the Courts, and as a result, most of them are not touched upon in this study. Such an exhaustive examination is beyond the scope of the investigation.

Furthermore, this study is limited to those Court decisions which have involved public school boards only. Actions involving separate school boards have not been considered. Although such cases may have implications for public school boards (just as those involving public school boards have implications for separate school boards) they are extensive enough to warrant complete study in their own right. Nor have various cases treating school matters been considered when the substance of the cases has fallen outside the direct concern of school boards, as for example, school section boundary changes in Ontario, where dispute may arise between ratepayers and the municipal council without involving the school board.





The study is further delimited in that no systematic examination of the relations between the board and its employees, especially teachers, is made. While this subject is largely concerned with the powers of the board, the whole matter was considered important enough to be treated in detail in a separate study. Rather than to make a superficial investigation, the writer has omitted it altogether.

Nor is the whole question of the school board's liability for school accidents treated in detail. This has been adequately done by Lamb<sup>7</sup> and Bargaen.<sup>8</sup> Both have cited numerous cases from which they have drawn the main principles which apply to school boards and teachers. Since the completion of those studies, few new cases have been reported, and no new principles of law established. Rather than to repeat what has already been done, the writer has omitted most of the references to the board's liability in regard to the tort of negligence.

In matters of school finance, such activities as the school board's assessment of property, levy of rates and collection of taxes are omitted from this study. Since school boards in most provinces requisition on municipal councils for school funds, and no longer maintain their own taxation machinery, that aspect was considered to be mainly of historical interest and therefore is not included.

To a certain extent the organization and presentation of materials

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<sup>7</sup>R. L. Lamb, Legal Liability of School Boards and Teachers for School Accidents. Ottawa: Canadian Teachers' Federation. 1959.

<sup>8</sup>P. F. Bargaen, The Legal Status of the Canadian Public School Pupil. Toronto: Macmillan Company of Canada. 1961. Ch. 7.



is a limitation of the study. Various forms of organization were attempted and all presented difficulties. The main reason for the present organization is that the case material on which the study depended heavily, does not uniformly cover all aspects of school operation. Hence, subject to the delimitations outlined above, there were further areas which had not been treated by the Courts. It is assumed that the legislation is clear enough in some of these respects that the school board's status is not in doubt. Secondly, a legal case may contain more than one point of law. When this was so, the writer discussed the case in the section of the study dealing with its most important point. The same case might have been used elsewhere to develop an idea of lesser importance, but because this would have led to excessive repetition, other cases were used whenever possible. For example, the matter of school finance is developed in two main chapters. The first, entitled "School Board-Municipal Council Relationships," treats many of the most important financial problems, while the following chapter, "Additional Considerations in School Finance," treats some of those aspects which could not be included there.

Thus, it has been difficult to organize so as to get a sense of continuity, but the final presentation was based on the following plan:

Chapter II: The establishment of the legal background and context of the study.

Chapter III: Presentation of an overview of the school board as a corporation, for in its corporate status almost its entire legal status is determined.



Chapter IV: A study of the relation between the school corporation and the municipal corporation with which it is most intimately associated.

Chapter V: Examination of other matters related to school finance. This chapter was placed so that it could be read in connection with the discussion of finance in the previous chapter.

Chapter VI: A study of the relation of the board to school pupils. When the board has been established and its position clarified, it finds that it exists for one primary purpose. The child has been granted a statutory right to education by the legislature, and it is the board's duty to provide.

Chapter VII: An examination of school conveyance. As part of its function of providing education, the board may have to convey pupils to school before education can begin.

Chapter VIII: An examination of school premises. They are studied because premises must be provided so that all other obligations to the pupil may be met.

Chapter IX: Study of school board contracts. In its operations the board must employ others to do the actual work. The board itself can only administer and therefore carries out many of its obligations through contracts.

Chapter X: An examination of some of the liabilities of trustees. In the course of its operation, the board, and individual trustees, may be subject to certain legal liabilities.

Chapter XI: Summary and conclusions.

### Definition of Terms

The terms which follow are those which are used generally throughout





the study and are presented here for convenience. They have not been given any special meaning but some attempt is made to clarify their use in this dissertation. Where the text deals with specialized terms, they are defined at that point either formally or their meanings made clear from the context and development of the subject matter.

School Board. As used here the term means the board of trustees, elected or appointed, which has been charged with the responsibility of administering the schools within its territorial jurisdiction. It includes board of trustees, board of education, high school board, public school board, etc.

School District. As used here the term refers to that territorial or geographic area within which the school board exercises its authority. The term includes the municipal school districts of British Columbia, the school divisions of Alberta, the school units of Saskatchewan, the high school districts of Manitoba and the central and eastern provinces. It is intended to include also urban school districts, school sections, township school districts and rural "four-by-four" districts. In short, the term includes any area set aside for school purposes of any kind, whether elementary or secondary, rural or urban, local district or centralization, overlapping or separated.

Municipality. As used in this study the term means that territory or geographic area within which any form of local municipal government exercises authority. The term is intended to include cities, towns, villages, counties, townships, rural municipalities and municipal districts. In the study distinction is made clear by the context as for example "the city of Toronto" or "the township of East Missouri."





Municipal Council. This term means the elected councillors or alderman charged with the responsibilities of administering local government within the boundaries of the municipality. The term includes such terms as municipal council, county council, township council, etc.

Public School. The term is used to designate a school supported by public taxation, a characteristic which distinguishes it from a private school. Under this definition a separate school is a special kind of public school, and as such many of the findings of this study have implications for the boards of separate schools. As used here, the term "public school" does not refer to a particular grade level. For such a distinction the terms "elementary school" and "secondary school" are used.

Statute Law. This is the body of law established by acts of provincial legislatures or the federal parliament. It is sometimes referred to as the written law.

Case Law. Case law is the body of legal rules established by the Courts and recorded in their decisions but not incorporated into formal statutes. It is sometimes referred to as the unwritten law.

Many other legal terms are defined in the body of the study as their use demands. Still others have their meanings clarified by the context in which they are used. A glossary of legal terms is given in the appendix.



## CHAPTER II

### THE LAW AND THE COURTS

In a federated democracy with its division of powers between federal and provincial authorities, and the further delegation of powers and duties by provincial authorities to local governments, the question of legal jurisdiction among governments is a real and continuous one. Constitutions and legislation set out the broad framework within which each level of government exercises its authority. However, in the infinite variety of everyday operation it is neither possible nor desirable to promulgate laws so specific that they will meet every contingency as it arises. Consequently, as governments sometimes exceed their statutory or constitutional authority, jurisdictional disputes develop. At this point the Courts are brought into play, to interpret, define or clarify the powers and rights of the parties in dispute. Furthermore, differences arise not only between governments, but also between government-- and its officials-- and the citizen. To apply the statutes and to enforce their provisions as they relate to officials and citizens alike, is the primary function of the Courts.

A study dealing with legal relations among governments and between governments and citizens, should delineate the legal authority of each level of government. Thereby the general context is established and the study is given its setting. However, since such a discussion of legal jurisdiction in education has been ably presented by both Bargaen<sup>1</sup>

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<sup>1</sup>P. F. Bargaen, The Legal Status of the Canadian School Pupil. Toronto: MacMillan Co. of Canada, Ltd. 1961. Ch. 2.



and Byrne,<sup>2</sup> no useful purpose could be achieved here by repeating the work of these writers, although this study fits into the same framework.

Less frequently presented, but of equal importance in contributing to the legal literacy of the educational administrator, is the matter of how the law and the courts actually function in practice. If it is of value to an educator to know something of the law, then it is important for him to develop some understanding of and familiarity with its processes and procedures. He should develop a background of information against which he can examine events having legal implications.

In the changing administrative situation in which boards and administrators find themselves, new questions continually arise. Statutes are constantly being revised; they may appear to be contradictory; they may be silent altogether on certain issues, or ambiguous in others. As a result disputes or differences arise in which pertinent issues should be submitted to a Court of competent jurisdiction. Ordinarily the layman fears involvement in litigation because he understands imperfectly not only the function of the Courts, but also the procedures which they employ. Therefore questions which should be ruled on by an authoritative tribunal are often settled by compromise which establishes no principle and permits the same problem to recur again and again without satisfactory solution. It is the purpose of this chapter to help layman to understand the Courts more fully and to dispel some of their unfounded fear of litigation.

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<sup>2</sup>T. C. Byrne, "Design and Structure in Canadian Education," Alberta Journal of Educational Research, III (March, 1957).





Finally, this chapter must provide the context within which the whole study proceeds. Some indication of the development of our legal system and the part it plays in the process of government is necessary to make meaningful the study of litigation which forms the basis of the whole dissertation. Consequently in this chapter the writer examines the function of the courts; the development of the British system of law, which has been largely transplanted to Canada; the matters of statutory law, case law and legal rules and precedents; and the processes by which an action is brought to and tried by a court of law.

## I. Some Principles of Law

### Government and Law

There can be no denial of the need for government. Because of the large number and variety of demands made in a highly industrialized nation, a public agency must be set up to conduct those services not provided by private agencies. Officials are needed to perform such services and they must be invested with the necessary powers, including the power to coerce the uncooperative. But at the same time, a democratic society rejects the idea of complete control by officials.

Thus has grown up the idea of a form of government with three distinct branches--the legislature, the executive and the judiciary. In theory at least, the three branches are rigidly separated, for as Montesquieu argued:

If anyone were both legislator and executive, he would himself administer a policy of his own making, which he might change as occasion arose, and the result would be unchecked opportunism. If anyone were legislator and judge, he would both make and interpret laws as and when he thought fit, and there would be no law apart from the whim of the moment. And if he were executive and judicial



authority he would judge in his own cause and be answerable to no-one but himself, and the result would be arbitrary power.<sup>3</sup>

It is by this separation of function that western society has achieved the fundamental principle of the supremacy of law. Government itself is controlled by law and is not subject to the whim of caprice of officials. To sustain the principle, laws must be so drawn that they do not give excessively wide discretionary powers to officials. Rather, when legal powers are granted, they must be in reasonably precise terms so that officials cannot act in an arbitrary manner. This raises one of the basic problems of government today: it has become so complex that it is necessary to delegate broad powers of initiative and decision which cannot be covered in detail by laws. Despite this necessity, the rule of law, namely that officials may not act arbitrarily, must hold, and the judiciary must ensure that it does.<sup>4</sup>

The courts are thus concerned with seeing that conduct conforms to certain fixed rules. Originally these rules were based upon common practice regarded as right by customary consent. But with increased social complexity such consensus is very difficult to attain, and the need for adherence to judicial rules is more pronounced. Were there no such rules, the individual would be at the mercy of officials and judges and their changing moods. It could not be known in advance what the legal consequences of an act would be. Every question would remain unsolved until it had been brought before a Court, and would still not be resolved

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<sup>3</sup>Quoted in Peter Archer, The Queen's Courts. Toronto: Penguin Books (Canada) Ltd. 1956. pp. 4-5.

<sup>4</sup>R. M. Dawson, Democratic Government in Canada. Toronto: Copp-Clark Co. Ltd. 1949. pp. 12-13.



when it next arose, for the decision might be quite different. Hence there is need for law which is firmly based on rules of some permanence.<sup>5</sup>

A law is a rule of conduct which is different from other rules chiefly in the fact that it is supported by sanctions at the disposal of the state. It becomes a legal rule if and when the state is prepared to enforce it. This does not imply that there is anything inherently fair or just about legal rules, for there have been, and probably are now, laws which the majority of citizens would consider unfair. Rather laws are amoral--they are binding regardless of whether they are morally just.<sup>6</sup>

#### Two Approaches to the Law

Basically there are two ways of considering the law. One is the positive law--that law to which each is subject every day. The other is the natural law, not observed in any nation of the world, but existing only in the thoughts of men. It is the concept of ultimate perfection in justice toward which men aspire.

Positive Law. This is the law as it is established under human sanction and the will of society, and in the English system it is comprised of statutes and Court decisions. It is a body of legal rules and principles forming a conceptual model to guide and explain the legal relations of man with his fellow-man. The positive law is not a perfect thing. Being man-made and accumulated from the past, it may be simultaneously self-contradictory, inconsistent, unsystematic and

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<sup>5</sup>Peter Archer, Op. Cit., p. 8.

<sup>6</sup>W. F. Frank, The General Principles of English Law.  
Toronto: Harrap & Co. 1957, p. 9.





inadequate to perform what is expected of it. But it is the law which is actually in effect.

Lawyers and judges deal primarily with the positive law. Their reasoning concerns precedents, statutes and constitutional provisions. Ordinarily the Courts do not rule on whether a law is good or bad, wise or unwise. Their primary function is to interpret the law as it is, not to make or modify it. The abstract concept of justice per se, taken apart from the established law of the society, is not considered under the positive law.

Natural Law. This form of law comprises those considerations of justice that are based on reason or on revelation. It is the projected image of the law, not as it is but as it ought to be. It arises out of logical deductions from principles which are assumed to be fundamental. It is not a system of law enacted and actively applied; rather, it is an ideal concept which may serve as a standard against which the positive law can be evaluated.

Relation Between Positive and Natural Law. It is difficult to conceive of a system of law functioning on the basis of one of these approaches without the other. As Black points out, "The real problems of law involve not faithful obedience to beauteous maxims but the mediation of competing claims each with a measure of soundness." It would be unrealistic for a judge to disregard the law as it is written or as it has developed in precedents, and to mediate a dispute purely on the basis of





his conception of natural justice. Again as Black says: "Problems of justice in law rarely present a single simple question. Many values are likely to be at stake. A measure of system is the alternative to chaos."<sup>7</sup>

It would be equally unrealistic to expect a Court to adjudicate a case strictly on the basis of positive law. Statutes which are vague or contradictory, or cases for which there is no precedent, may come before it. Faced with such a situation, the Court may do one of three things: (1) It may attempt to find the principle of the statute or of the lines of precedent, and then determine how this principle applies to the case before it; (2) The judge may have recourse to what he thinks to be communal feelings of justice; (3) Where these more impersonal techniques fail to determine the decision, the judge may be brought to his own view of the justice of the matter. The last two of the alternatives derive from concepts of natural law.

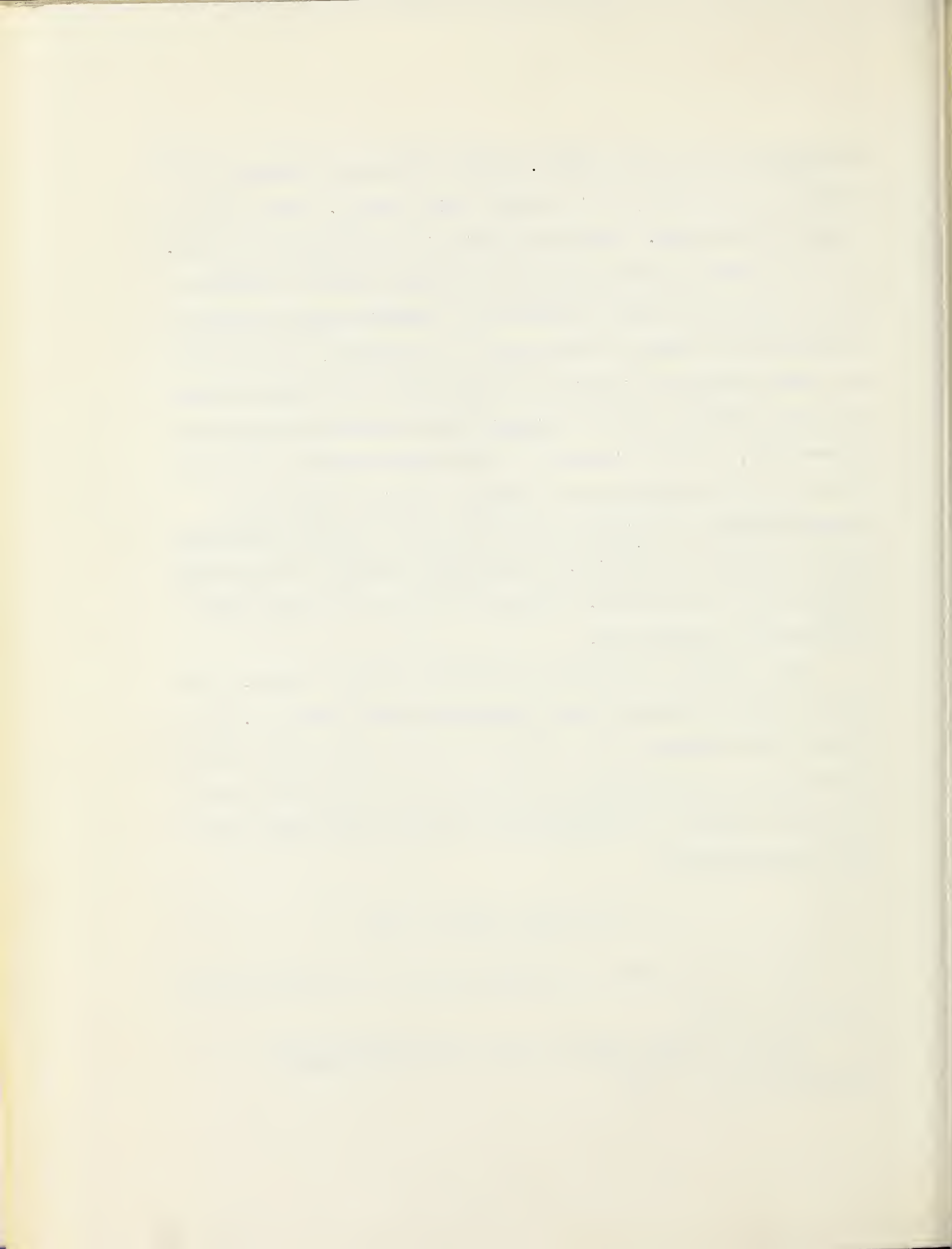
Thus, although neither can be functional in and of itself, it is sound to apply the positive law as influenced by the natural law. The extent of this influence will be governed by what society itself permits and aspires to, and provision for such aspiration is often made through deliberate vagueness of legislation and the leeway given courts to make their interpretations.

## II. The English System of Law

The law is not static. It changes, grows, or is modified just as

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<sup>7</sup>Charles L. Black, "The Two Cities of Law," The Saturday Evening Post, April 2, 1960.



the language of a people. It adapts itself, as the economy and social climate change, to the new tasks and requirements of the evolving society. Hence the student of law cannot properly understand the law of the country unless he pays some attention to its history.

### The Nature of English Law

One of the chief characteristics of English law is its continuity. The system has grown from its ancient origins to modern times through continuous adaptation to the conditions of a changing society. Over the years many rules have been developed and accumulated, and although the reasons for the rules may have disappeared, the rules themselves have remained unless specifically repealed by legislative action. English law has been consolidated but not codified. Consolidation is the process of bringing together in statute form legal rules which have been widely scattered in judicial decisions, customs and statutes, whereas codification may not only collect but fundamentally alter what is collected in a major piece of legal reform. In addition codified law attempts to be all-embracing in its implementation. Furthermore, English law is basically judge-made. Parliamentary Acts are passed only when it is felt necessary to fill in the gaps in judicial law or to bring it up to date with modern social trends and conditions. Thus English law springs from the common law and equity, supplemented in increasing measure by legislation.<sup>8</sup>

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<sup>8</sup>W. F. Frank, Op. Cit., p. 10.



The Common Law<sup>9</sup>

The term common law signifies the law which has not resulted from legislation but rather has developed out of the decisions of the Courts and from the customs of the people. The common law reaches back to very early times when local customs formed a substantial part of the law. Though today custom is not a creator of law, much of what was developed in remote periods of history survives in legal rules and precedents which are applied by the Courts. Thus the common law is a body of legal rules and principles based upon usages and customs developed over the centuries and preserved and applied in the decisions of the Courts.

English common law had its origins in the time of William the Conqueror, when some attempt was made to administer the law fairly. Travelling royal commissions were established to watch over local administration and tax collection. They were also assigned certain judicial powers which gradually grew in importance. Among their duties were hearing and trying all cases of major crime which had occurred since their last visit, and also settlement of civil cases which had arisen.

In earliest times justices applied only the law of local custom at their hearings. In the double task of discovering and applying the local customs, they had the help of juries whose function it was to report to the justices all the facts concerning the case and also the customs which might apply. Between their tours of the country, the commissions met at Westminster, where commissioners also sat on the royal courts. It was inevitable that through exchange of experiences and judgments

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<sup>9</sup>Glanville Williams, Learning the Law. London: Stevens & Sons Ltd. 1957. p. 24.





delivered, a certain measure of standardization and rule should creep into commission procedure. These rules gradually replaced local customs, and though built on local custom, became the legal standard of the whole country.

As was suggested above, at Westminster were courts other than the royal commissions. These included the Exchequer Court which dealt with the royal finances and revenues; the Court of Common Pleas which dealt with all types of disputes between citizens; and the Court of King's Bench, so named because on occasion the King sat as one of the justices. Because they consisted partly of the itinerant justices of the royal commissions, and because of their power to issue prerogative writs, the courts of Westminster exercised a considerable measure of supervision over all other courts.

Prerogative writs were special writs by which the king could supervise the work of court officials and of public officers. The writs were documents under the seal of the Crown or officer of the Crown, commanding the person to whom they were addressed to do or forbear from doing some act. They were so called because they were issued by virtue of the Crown's prerogative.

Prerogative writs continue in existence today. They are granted at the discretion of the Court but only on proper cause being shown and not as a matter of right. The following are some of the more important ones in so far as school law is concerned:

Mandamus: An order to a corporation, its officers, or to an executive, administrative or judicial officer, or to an inferior Court commanding the performance of a particular act which is the duty of the

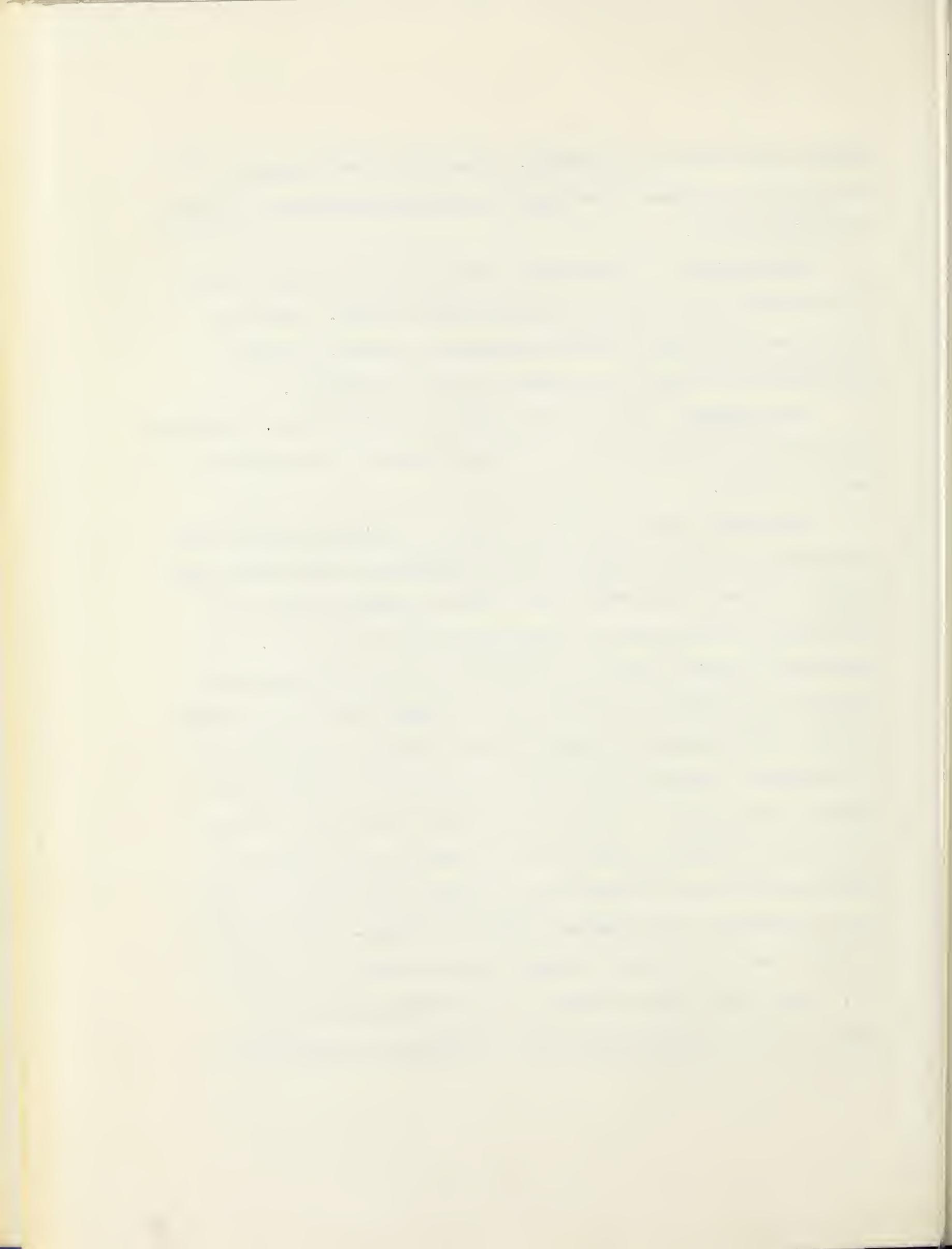


person to whom the writ is directed. It may also command that the complainant be restored to the rights and privileges of which he has been illegally deprived.

Prohibition: An extraordinary writ directed by a superior Court to an inferior Court or body exercising judicial powers. This writ arrests the proceedings of such a body, Court or person, when such proceedings are without, or in excess of, their jurisdiction.

Quo Warranto: A trial of the legality of public office. The holder of the office is challenged to show "by what warrant" he exercises the powers of office.

Proceedings in the common law courts were initiated with the issue of a writ which had to be obtained from the chancery or main royal office. The writ consisted of an order to the sheriff, commanding him to bring the defendant to court, and it outlined the cause of the action. For every cause of action there was a different writ, and these writs were collected in a register of original writs. Remedies granted by the Court depended wholly upon the writ, and if it was improperly drawn, the case was dismissed. Frequently new causes of action arose for which no writ existed in the register. Drawing of new writs to cover these cases was permitted, but because of a fear that the common law was becoming too complex, as well as the feeling that the drawing of new writs was being abused, resistance to the practice gradually developed. This meant that the common law courts could not handle cases not covered by an original writ. With further social, economic and political evolution, this resulted in new cases arising for which the common law courts had no



remedy and for which they could not dispense justice.<sup>10</sup>

### Equity

When the common law courts failed to give redress in cases where it was needed, disappointed litigants petitioned the king for redress. The King, as the fountain-head of justice, set up a special court, the Court of Chancery, presided over by the chancellor, the keeper of the king's conscience, to deal with these petitions. Three situations gave rise to actions in equity. First, the common law provided no remedy for certain wrongs and these cases were then handled in the Courts of Chancery. Second, common law remedies were inadequate, and third, the judge was alleged to have been partial in the legal hearing.

Contrary to procedure in courts of common law, the chancellor was not restricted by rules. No writs were required and the chancellor's only concern was to get to the bottom of a matter and to make his recommendations. Thus, early equity was not a coherent system of law, but was based rather upon the personal concept of right held by successive chancellors. However, as the amount of litigation coming before the Court of Chancery increased and as the jurisdiction of the court was enlarged, it became necessary to increase the number of judges and therefore to standardize rules and procedures. Procedures which had been applied gradually hardened into rules of law and became part of the total law of the land.

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<sup>10</sup> W. F. Frank, Op. Cit., pp. 11-13.





In the vernacular equity means equal justice, and originally the system of equity was inspired by ideas of absolute justice. Today, however, equity is no more nor less just than the common law. The most important branch of equity is the law of trusts, but equitable remedies such as the decree of specific performance and injunction are also very important, and these remedies can be given only in equity. They do not exist at law. In cases of conflict between the rules of the common law and the rules of equity, equity prevails.<sup>11</sup>

#### Differences Between Common Law and Equity<sup>12</sup>

Primarily the common law was a complete system of law whereas equity consisted of a number of isolated principles stating when and how a Court would grant specific remedies. While equitable rights were valid only against persons required in conscience to recognize them, legal rights were valid against the world at large. In the matter of time limits, an action at law might be brought at any time permitted by statute. Actions in equity must be brought promptly. If a person omits to assert a right for an unreasonable or unexplained length of time, under circumstances prejudicial to his opponent, he prejudices his own case. Finally, all equitable remedies such as decree of specific performance or injunction, lie within the discretion of the Court, which need not grant them merely on proof that the condition complained of exists.

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<sup>11</sup>Ibid., pp. 14-16.

<sup>12</sup>Ibid., pp. 17-18.





Judicature Act, 1873<sup>13</sup>

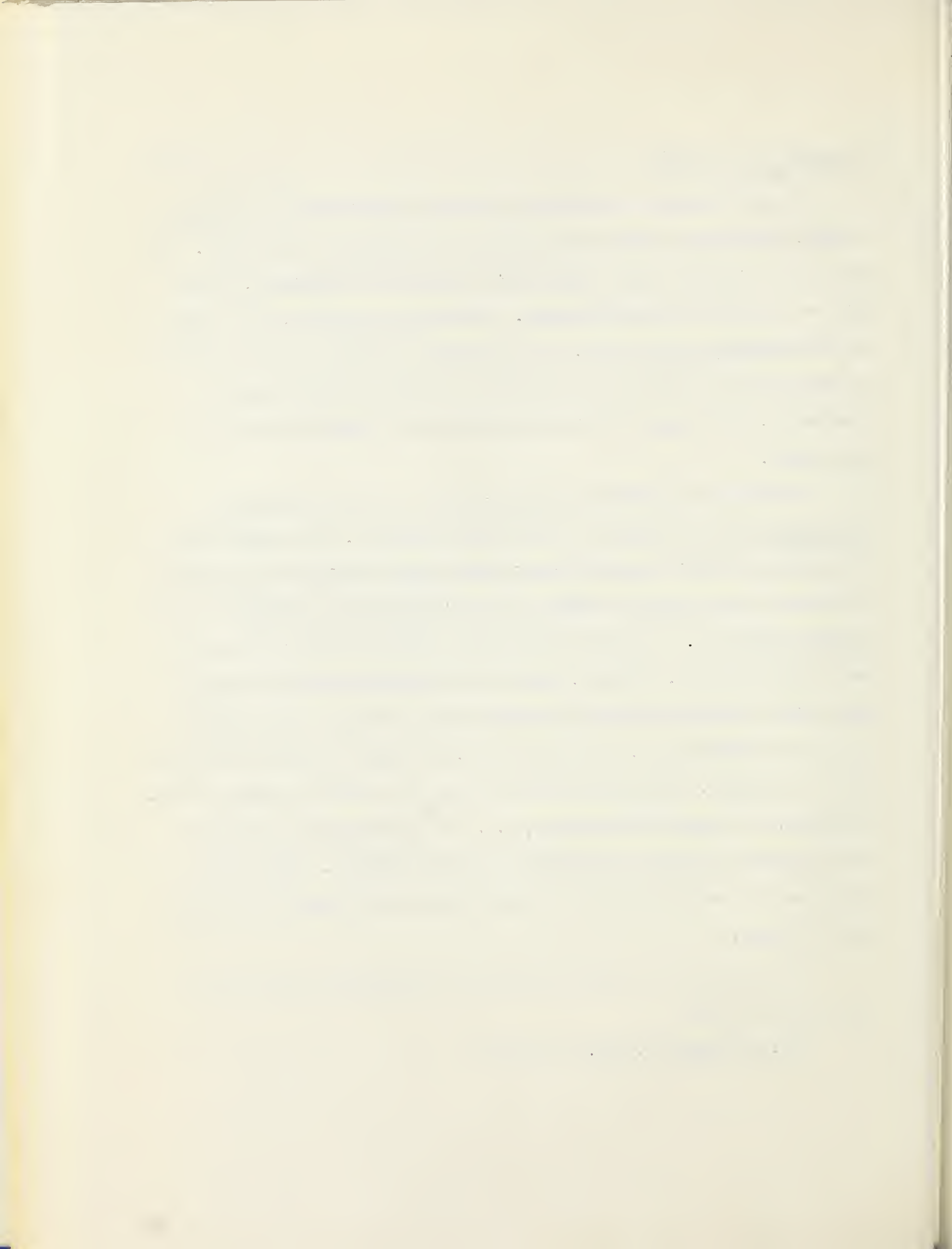
Until 1875 the two branches of law were administered by different courts, which meant that actions might have to proceed in two courts. If they were initiated in the wrong court, they might be dismissed, giving rise to confusion and inconvenience. At that date, however, as a result of the Judicature Act of 1873, the old courts of common law and the Court of Chancery were abolished and replaced by a single Supreme Court of Judicature, each branch of which had full power to administer both law and equity.

Although it combined the administration of law and equity, the Judicature Act did not fuse law and equity themselves. Thus modern rules of equity must still be read in the light of those developed by the Court of Chancery, and common law rights must be interpreted in the light of the ancient common law. In cases where law and equity conflict, the rule is that equity prevails. However, because the Court may deal with both law and equity, when the equitable rule upon which a litigant relies fails, he may take advantage of, or be subject to, the common law rule with which it is at variance. There is no need to pursue the action in another court. In Canada, all common law provinces, i.e. all except Quebec, have their own Judicature Acts which are similar to that of England. Under their provisions the courts administer law and equity in the same way as do the English Courts.

The principle that equity prevails is illustrated by the case of

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<sup>13</sup>G. Williams, Op. Cit., pp. 26-27.



Quinlan V. St. John School Trustees.<sup>14</sup> A New Brunswick school board found itself short of funds to operate its school. The rate voted by the annual meeting of ratepayers together with the grant from the County School Fund, was insufficient to meet the teacher's salary and other maintenance costs. Thus, in December, 1909, plaintiff Quinlan, one of the trustees and secretary-treasurer of the board, with the consent of the others, borrowed fifty dollars from the bank on the personal note of the trustees. The same situation arose in June, 1910, and this time Quinlan borrowed \$100 on a note signed by the trustees. When the notes fell due they were extended, but eventually the bank sued on them and judgment was taken against Quinlan personally. He paid \$105 in cash and the sheriff levied against his goods for the remainder. To reimburse himself, Quinlan then sued the school board for the amount of the two notes. The board, now consisting of new trustees, refused to pay him on the grounds that the previous trustees had had no power to borrow, and the board was not obligated to honor an illegal transaction.

The Court held that the board had not, in fact, had the power to borrow money even to conduct necessary school services. The Act outlined ways in which such money was to be raised and the board could not go beyond those powers. The bank had not lent money to the board, but rather to the trustees as individuals on their personal notes.

Since, however, Quinlan had paid the notes, his money had actually paid the teacher's salary for which the board had legally contracted and for which the district was legally liable. Plaintiff had paid off the

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<sup>14</sup>(1913) 14 D. L. R. 376.



liability of the district to the extent of \$150 and the only possible reason for not repaying him this amount was the technical question of whether the board could borrow money at all. The judge found that actually there had been no borrowing involving the school district. There had been no change in the total liability of the district. What had occurred was merely a change in the district's rightful creditors. Quinlan had merely paid off the debts which the district was bound to honor. In equity, it was therefore bound to repay him. Equity prevailed over the technicalities of the statute relied upon by the defendant school board.

### III. Case Law, Precedent and Legal Persons

#### The Doctrine and Basis of Judicial Precedent

Both common law and equity are judge made. In English law, and consequently in those nations which have adopted it, it is an unwritten--in the sense that it is not laid down by statute--but basic principle that judges should stand by their decisions and those of their colleagues. This is founded on the belief that the only thing more important than that the law should be fair is that it should be certain. Such certainty would be impossible if judges were to deal with problems before them without regard to how they had been considered by themselves or by other judges on previous occasions. In earlier times, judges studied decisions with great care but reserved the right to deviate from them. More recently they have been bound by the judgments of higher Courts.

In its decision a Court not only disposes of the problem before it, but lays down a legal principle for other judges to follow. Thus decisions of all judges are studied with respect, but only the decisions of superior





Courts are binding on those of inferior jurisdiction. Other decisions may be classed as persuasive precedents and need not be followed unless the judge agrees with them.<sup>15</sup>

Legal Rules. Obviously no two cases coming before the courts are exactly alike in all respects. However, that part of the case which possesses authority and is the rule of law upon which the decision rests may be abstracted and generalized. Cases must be decided in the same way when their material facts are the same. Which facts are legally material depends upon the particular case, but they are such that the rule of law on which the decision proceeds will apply equally well to other persons committing similar acts in similar circumstances. Thus, in an action for damages for injury sustained in a school bus accident, such facts as the date, or the model of the bus are immaterial, but the fact that the driver drove in a negligent manner and that plaintiff's injury was caused by his negligent driving are material facts and would apply equally in a similar case. The Court's ruling that because he injured the plaintiff as a result of his negligence, he must be held liable in damages, forms the legal precedent for other courts.<sup>16</sup>

Ascertaining the rule of law in a case is a process of abstracting from the totality of facts that are involved. The higher the level of abstraction, the wider the generalization and the more inclusive the legal rule that is developed. However, Courts do not permit their predecessors

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<sup>15</sup>W. F. Frank, Op. Cit., pp. 20-21.

<sup>16</sup>G. Williams, Op. Cit., pp. 66-67.



to lay down rules of unlimited width. In fact they attempt to give decisions on the narrowest possible rules. Thus a Court in reviewing a case cited in support of an argument may say that the rule it states is unnecessarily wide, and that a narrower one is sufficient to justify the decision. If the wide rule is inconsistent with the judgment in another case which has some similarities, it must be rejected, for such an unduly wide rule could have consequences which are unjust, inconvenient or otherwise objectionable.

When a Court finds a rule established in an earlier case unacceptable, it may distinguish that case from the one before it. Legal distinguishing is of two kinds: restrictive and non-restrictive. Restrictive distinguishing is a process of narrowing the legal rule by considering as material some fact of the earlier case which the previous Court treated as immaterial. Thereby the legal rule is limited in its application to such an extent that it does not determine the case under consideration. The justification for such an action is that the original rule was unnecessarily wide and that the narrower rule supports the judgment equally as well, without prejudicing justice in another case which differs sufficiently to warrant application of a different rule. Non-restrictive distinguishing is the process of accepting the rule of a previous case without seeking to curtail it, but finding that the present case does not fall within its limits because of a difference in material facts. A case is not an authority, at least not a binding authority, for a point not raised in it, even though the facts were such that it might have been raised.<sup>17</sup>

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<sup>17</sup>Ibid., pp. 67-75.



Often a judge may make a comment or chance remark as an aside.

Such a comment is not binding on future Courts, but is respected according to the judge who made it, the eminence of the court from which it came and the circumstances in which it was made. A rule stated by way of analogy, or a suggested rule on which the decision does not firmly rest, would be an example. These remarks are not usually considered binding rules because they may be made without full consideration of all the consequences which may follow, though sometimes they may guide other Courts in their deliberations, and help them to firm decisions.

#### The Hierarchy of Legal Authority<sup>18</sup>

The rule in the doctrine of precedent with its hierarchy of authority is that every Court binds those of lower jurisdiction, and some may bind even themselves. In England a case decided by the Law Lords of the House of Lords binds all other Courts and even the Lords themselves. and can be reversed only by statute. A case in the English Court of Appeal binds all lower Courts and with exceptions which need not be set out, the Appeal Court binds itself, but not the House of Lords. When an appeal Court reverses or overrules the decision of a Court below, that decision loses all authority. Reversal occurs when the same case is decided in favor of the other litigant on appeal; overruling occurs when a case from a lower Court is cited in a different case before the Appeal Court and is there held to have been wrongly decided.

The Supreme Court of Canada binds all provincial Courts, and its decisions are binding on itself except in rare cases where it is convinced

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<sup>18</sup>Ibid., pp. 81-82.





that a previous judgment was wrong. Up to 1949 the Supreme Court of Canada was bound by the Judicial Committee of the Privy Council, but Canadian cases are no longer referred to the Privy Council.

Provincial Supreme Courts consist of two parts: the trial division and the appellate division. Judgments of both are binding on inferior Courts such as District or County Courts, Magistrates' Courts, or those of Justices of the Peace. The appellate division also binds the trial division and generally regards itself bound by its own previous decisions. But the trial division does not bind itself. One justice, if he feels strongly enough, may refuse to follow the judgment of another, and the resulting conflict of authority will one day have to be settled in a Court of Appeal. However, a judge can only disapprove the decision of one of his brethren. He can refuse to follow him, but he cannot overrule him. Refusal to follow is rare.

Judicial, or case law has certain advantages over systems which place more stress on statute law. It is more practical because for every rule there is at least one practical illustration--the case in which the rule was first developed. It is also more flexible than statute law, in that it can be modified by the courts without long parliamentary procedure. There are also defects which must be taken into account. The hundreds of cases with binding force decided each year, add tremendously to the total body of law which must be known. This poses a problem of some magnitude to the courts themselves, but its impact on the individual is even more significant. Since it is held that ignorance of the law cannot be advanced as a defence in legal action, the individual finds it more and more difficult to know the law concerning matters which affect him or in





which he is interested.<sup>19</sup>

### Legal Persons

A legal person is any entity who is accepted by law as a subject of legal rights and duties. In English and Canadian law legal personality is almost synonymous with physical personality in that every human being is a legal person. Legal personality begins at birth and ends at death. In addition to human beings, corporations are considered as legal persons. Legal attributes of corporations are briefly touched upon here, but are more fully discussed in Chapter III of this study.

A corporation is a group of physical persons associated for some common purpose. The corporation is treated by law as a person in its own right, quite apart from the persons who are its members. Corporations are of two kinds: the corporation aggregate and the corporation sole. In the former, the members are in existence simultaneously, while in the corporation sole they exist in succession so that at any time the corporation sole is represented by one member only. The corporation sole was a creation of medieval lawyers who dreaded the idea that land or other property, as for instance that of the Church or the Crown, could be temporarily without an owner. The solution was to designate an office as the corporation and the holders of the office as the members of the corporation. The corporation, unlike its members, had perpetual existence and there was no danger of the property being left without an owner. The most important corporation sole today is the Crown.

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<sup>19</sup>W. F. Frank, Op. Cit., p. 22.



Corporations aggregate, a much more common type of corporation, come into existence by Royal Charter, by Act of a legislature or by procedures laid down in Companies Acts. The granting of Royal Charters is today severely restricted, but crown companies and railways are examples of corporations created by an act of parliament or of a provincial legislature. Municipal and other public corporations also belong in this class. Trading corporations are examples of the third kind.

The most important characteristic of a corporation is that in law it has an existence separate from that of its members. Thus it is possible for members to make contracts with it and even to take legal action against it. Because the corporation is a legal person, it has the power to sue and to be sued.

The contractual capacity of a corporation is dependent upon the method of its creation. No corporation can enter into contracts which only human beings can enter into, as for example a contract of marriage, but with that exception, chartered corporations may enter into any kind of contract. Statutory and trading corporations, however, can enter into only those contracts, and exercise those powers that fall within the objects of the corporation, and which have been set out specifically in the statute creating the corporation. All other contracts and powers are ultra vires the corporation.<sup>20</sup>

Corporations are liable for the torts committed by their servants in the course and scope of their employment. Similarly, by statute,

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<sup>20</sup>Ibid., pp. 46-48.



corporations can today be made responsible for certain criminal offences committed by their servants in the course of their employment.

#### IV. Statute Law and Statutory Construction

As was indicated above, and as is obvious to the observer, the ancient common law, the rules of equity and the development of case law and legal precedent are inadequate in developing coherent and comprehensive guides for the purposes of government in a complex and rapidly growing society. New circumstances continually arise in an industrial society characterized by a high level of social and economic interdependence, big business, big labor and big government, and older rules and precedents may be inadequate to meet the legal needs of the society. Legislation must be passed to fill those gaps left by other forms of the law. Such legislation proceeds in the light of the discussion of constitutional and jurisdictional limitations in Chapter I. It is then the function of the courts to give clarity and meaning to statute law. They must settle jurisdictional conflict, interpret statutes and bring harmony between statutes and the general body of accumulated legal rules and principles. An examination of statutory construction will throw light on this function.

A statute consists of such technical parts as the title, the preamble, the enacting clause, the body of the act, exceptions and provisos, interpretation clauses and repealing or saving clauses.<sup>21</sup>

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<sup>21</sup>M. K. Remmlein, School Law. New York: McGraw-Hill Book Company, Inc. 1950, p. 4.





Statutes are construed on the following principles:<sup>22</sup>

- (1) Meanings involved must be taken from the wording of the statute and not from extraneous sources;
- (2) Words are interpreted according to literal meaning unless this leads to a manifest absurdity;
- (3) Words are interpreted in context and not in isolation;
- (4) Where words are ambiguous the statute is considered as a whole in an attempt to discover the intent of the legislature;
- (5) The presumption of the court is against the alteration of the common law;
- (6) Where a list of specific words is followed by general words, the latter are interpreted to be of the same kind as the former. If the statute uses only specific words, then it is taken to apply only to them and to no others, even though others to which the statute is purported to apply may be similar. In addition the interpretation section of the statute specifically defines many of the terms used in the Act, thereby limiting their meanings for the purpose of the statute.

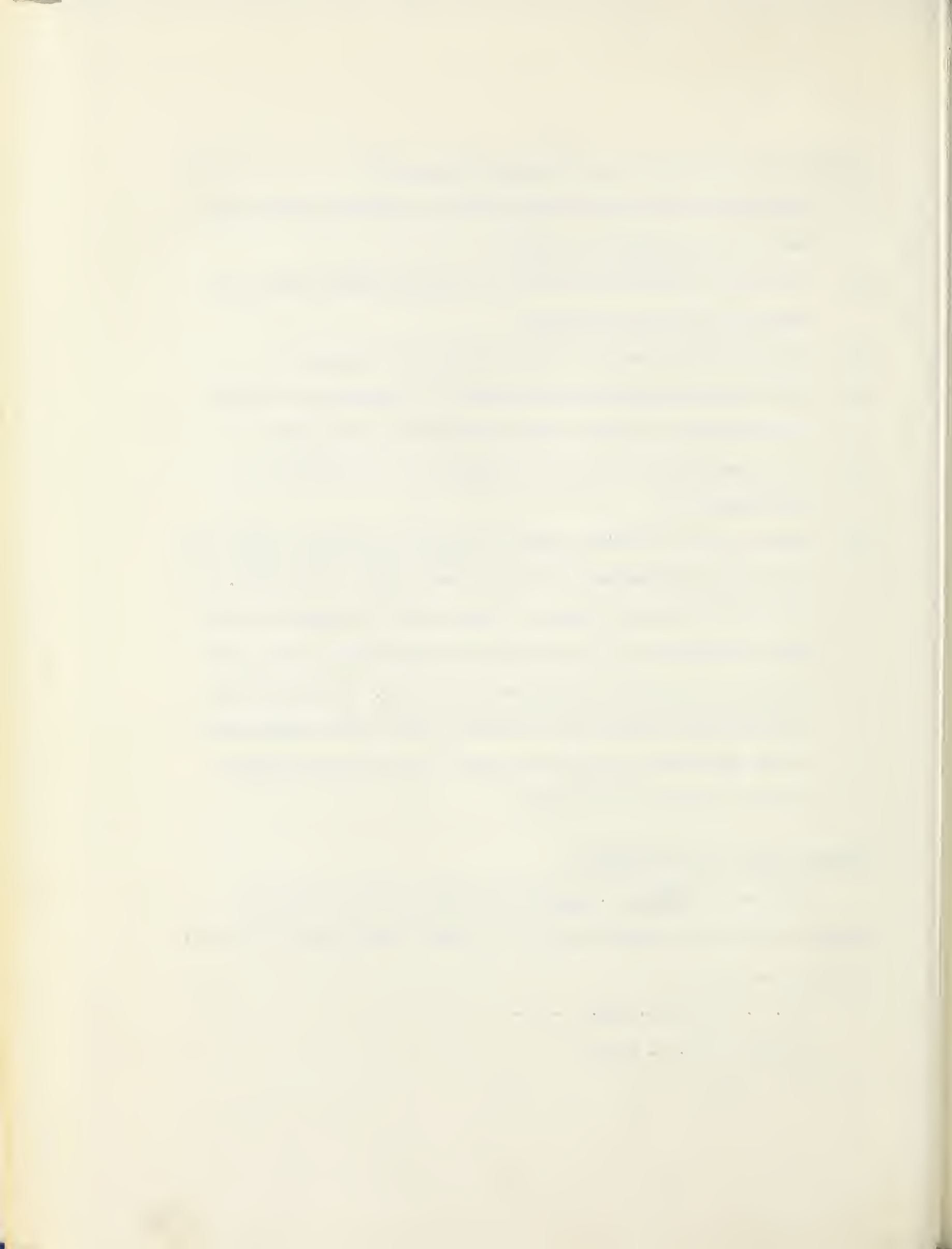
#### Meanings Taken from the Statute

The case of McCuaig v. Hinds<sup>23</sup> illustrates the rule that the meaning of terms in a statute must not be taken from extraneous sources.

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<sup>22</sup>W. F. Frank, Op. Cit., p. 22.

<sup>23</sup>(1909) 11 W. L. R. 652.



In this case the meaning of the term "resident" was raised in connection with defendant's qualification as a school trustee in Manitoba. Sec. 22 of The Public Schools Act<sup>24</sup> stated that trustees must be resident rate-payers within the school district. Sec. 239 used the term "actually resident," the pertinent parts of the section being: "Any trustee who ... ceases to be an actual resident within the school district... shall ipso facto vacate his seat." Defendant was a trustee who worked and slept on his farm in the school district, but his wife and some of his children lived in Portage la Prairie. They had done so for a number of years and the children attended Portage la Prairie schools. He visited there almost every week-end. Although he had been elected to two consecutive three-year terms previously, his qualifications had never been questioned before. The case proceeded on his not being actually resident, and plaintiff took the definition of "residence" from The Election Act which defined it as: "the place where a man's wife and family live, in the case of a married man."

The Court held that the word "residence" was indeed ambiguous in The Public Schools Act. Although the Act required the trustee to be a resident ratepayer, it did not define the term. However, it was held to be incorrect to use the definition from another statute. Rather the common law definition should be applied. The judge said:

The offense with which the defendant is charged is a purely statutory one, and if the statute does not clearly define what is meant by the words and expressions in certain sections of the Act, the recognized judicial interpretation must be accepted.

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<sup>24</sup>R. S. M. 1902, c. 143.



It would be an error to take the special definition of a word which may be in another statute, for the purposes of that statute, wherein the statutory offense was created, and apply that special interpretation to any or all statutes wherein such words occur, and in which they have not been specifically defined.

### Literal Construction of Terms

According to the second and third principles of statutory construction, words and phrases are to be construed according to literal meanings in context and not in isolation. Technical words and those which have acquired a special meaning in law are, of course, construed according to their technical meanings. Usually, the singular includes the plural, the masculine the feminine, but "man" does not always include "woman." Certain words must be carefully read, for they take meaning from general context and intent of the legislature as evidenced by the statute. "May" usually designates a discretionary power, but not a duty; "must" or "shall" indicate a duty. However, "may" has frequently been interpreted to indicate a duty, especially when it applies to a government agency, and thus it cannot be interpreted as designating permission<sup>25</sup> only.

To illustrate interpretation of terms according to their literal meaning, one might cite the case of C.P.R. v. Winnipeg.<sup>26</sup> Briefly,<sup>27</sup> the city of Winnipeg had, in 1881, made an agreement with the C.P.R.

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<sup>25</sup>M. K. Remmlein, Op. Cit., p. 8.

<sup>26</sup>(1900) 30 S.C.R. 558 reversing 12 Man. R. 581.

<sup>27</sup>The case will be discussed in some detail in a later chapter.





whereby the latter would be exempted forever from "all municipal taxes, rates, and levies and assessments of every nature and kind." The city by-law containing the agreement was subsequently ratified by the Manitoba legislature. The question at issue was whether this statement of tax exemption included school taxes as part of municipal taxation. Concerning the phrase cited, the Supreme Court of Canada held that the terms were not altogether free from ambiguity. According to the rules of grammatical construction, however, the adjective "municipal" refers only to "taxes, rates and levies" and does not qualify "assessments." If the first conjunction "and" were not there it would qualify "assessments." However, since it is there, according to the literal construction of the sentence, C.P.R. property is exempt not only from all municipal taxes, rates and levies, but also from assessments of every nature and kind.

In Re Osmet and Indian Head<sup>28</sup> the Court distinguished a similar agreement from that in C.P.R. v. Winnipeg by showing that exemption from "general municipal taxes" was quite different from that of "all municipal taxes, rates and levies and assessments of every nature and kind." Thus the language of the agreements was strictly construed according to the literal meaning of the terms used.

A further illustration of words interpreted according to literal meanings is given in Re Maczewski.<sup>29</sup> According to The Public Schools Act,<sup>30</sup> a trustee to qualify for election in Manitoba must be able "to

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<sup>28</sup>(1907) 7 Terr. L. R. 462, 6 W.L.R. 114.

<sup>29</sup>(1928) 2 W.W.R. 24.

<sup>30</sup>R.S.M. 1913, c. 165, s. 24(2).





read and write." Maczewski, elected as a school trustee, was unable to read and write English, but could do so in both the Ukrainian and Polish languages. The school inspector disqualified him as a trustee on the basis of the above condition.

Stackpole, C.C.J., quoting Lord Esher, M. R. said:

If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity. The Court has nothing to do with the question of whether the Legislature has committed an absurdity.

If the Court undertakes to assume that the Legislature meant something other than it said, it would be entering upon dangerous ground and there might ensue a result, judge-made law, which the Legislature never intended.<sup>31</sup>

In The Municipal Act<sup>32</sup> the legislature had changed the general expression to "read and write English" but had left The Public Schools Act unchanged. The intention therefore seemed clear. The popular interpretation of the words "able to read and write" is to refer to the English language, but in this case that interpretation was wrong.

#### Construction in Terms of the Whole Statute

One of the cardinal rules of statutory construction is that the statute must be read as a whole, for the language of one section may affect the interpretation of another. Inconsistencies or discrepancies between sections may raise ambiguities which may make it difficult for courts to decide a case which brings into play more than one section of the law. Also, if a law has remained on the statute books for some time and a body of interpretation has accumulated around it, a new law dealing

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<sup>31</sup>(1928) 2 W.W.R. 24, at p. 25.

<sup>32</sup>R.S.M. 1913, c. 133.



with the same subject matter in similar terms is deemed to have incorporated these past understandings by implication, unless the new law specifically and explicitly states the change. On the other hand, a change in the law may be considered by the courts as a deliberate legislative attempt to change previously accepted meanings; otherwise, they hold, no change would have been made.<sup>33</sup>

#### Alteration of the Common Law

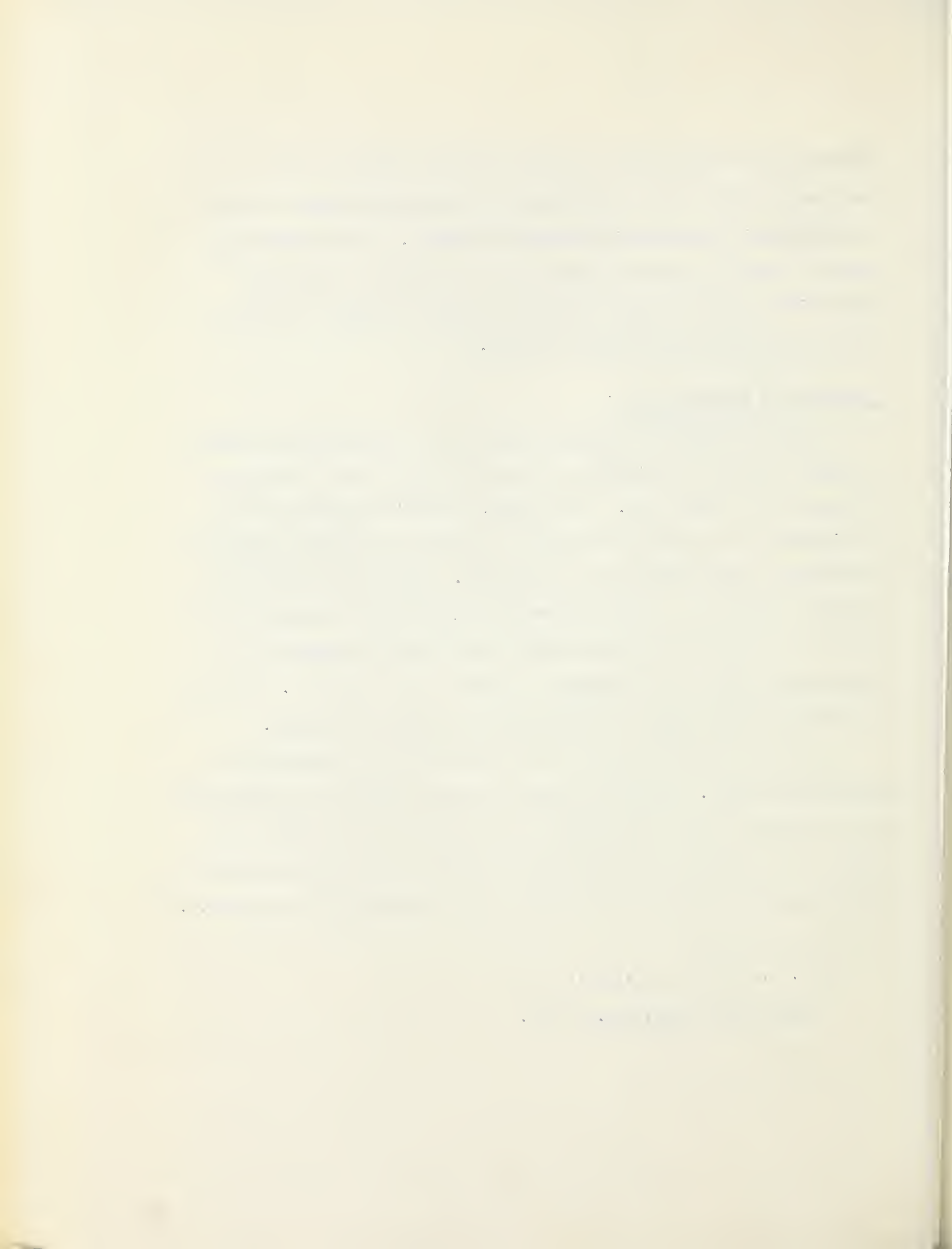
Unless a statute is perfectly clear in its intent and its wording to change a common law principle, the courts presume that no change has been made in the common law. For example, the ancient principle that the king can do no wrong, has been held to immunize government from suit for personal injury caused by its negligence. Some statutes attempting to impose liability on certain government agencies have been held by the courts not to have achieved this result because their language was not sufficiently clear in its intention to abrogate the common law. All Acts purporting to alter common law principles are strictly construed.

But even when the common law has been altered by legislation, it has not been erased. Rather, its rules have been modified or supplemented, for the statute is still interpreted and understood in the light of the common law as a whole. As Archer says: "A statute may be like the leaven which alters the character of the whole, but is absorbed in the process..."<sup>34</sup>

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<sup>33</sup>M. K. Remmlein, Op. Cit., p. 4.

<sup>34</sup>Peter Archer, Op. Cit., p. 15.



Strict Construction of Statutes

Some statutes or sections of statutes are construed liberally while others are given strict construction. Those which have the effect of interfering with the rights of individuals, for example property rights, are strictly construed. Laws of this type are those dealing with expropriation of lands for public use, or taxing statutes which provide severe penalties for non-compliance. In these cases, the governmental authority must follow strictly the procedures laid down by the legislature for the rights of the individuals are safeguarded by these procedures.

An illustration of the view taken by the courts on this issue is given in School Trustees of Port Hope v. Port Hope.<sup>35</sup> School trustees passed a resolution to requisition on the Town of Port Hope an immediate payment of £2500, £500 for purchase of a school site and £2000 for erection of a school house. The town council refused the requisition on the grounds that the request for immediate payment was unreasonable if not impractical, and that the demand was not specific as required by statute.

The Court pointed out, in the subsequent application by the board for mandamus to compel the council to comply with its requisition, that by statute, the board was required to prepare and lay before the council, its estimates for purchasing sites, building schools, maintenance of schools, etc. If properly made, the estimates could not be refused by the council, and mandamus would be granted. However, in the present case, the board had not prepared a proper estimate and laid it before council. The communication of the board's resolution to the council was not an

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<sup>35</sup>(1885) 4 U.C.C.P. 418.





estimate as required by statute. The Court said:

It is merely a peremptory requisition for a large sum of money; and if twice or ten times as much were right, the Court might as well be moved to enforce the payment without any additional explanation to shew it a reasonable exercise of the very wide discretion and powers vested in the board. Nor do I think a demand to furnish such a sum immediately reasonable, without shewing that the municipality possessed funds readily to be applied at a moment's notice.

...In exercising the large powers vested in the Board of Trustees when a direct taxation to so large an amount is to be imposed upon the inhabitants, not by the Board directly but through the Municipal Council upon their requisition, we must see that the terms and substance of what the statutes and the law require have been correctly complied with. One thing required is the preparation of an estimate; another is a distinct application to the council to do that which we are called upon to enforce. My impression is that the present proceedings are deficient in both these respects.<sup>36</sup>

A Manitoba<sup>37</sup> case shows the same general reasoning. Trustees of the Myrtle Consolidated School District, on the strength of a resolution passed by a special meeting of ratepayers, decided to build a four-room school house at a cost of \$30,000, which amount would include the cost of the site. They requested the municipality to submit a by-law for this sum to the ratepayers. The municipal council did so and the by-law was defeated. Notwithstanding these results, the board let a contract for construction of the school house, having in the meantime provided temporary school accommodation. Because it had anticipated the second defeat of the by-law, the board requisitioned the municipality to levy the total amount in the current year. The requisition amounting to \$42,000, consisted of \$30,000 as above, plus \$12,000 for operation and

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<sup>36</sup>Ibid., at pp. 422-23.

<sup>37</sup>Phillips v. Ross, (1921) 1 W.W.R. 298, 31 Man. R. 62, 56 D.L.R. 381, reversing (1920) 3 W.W.R. 544.



maintenance. Acting on the assumption that the whole amount was required for current expenses for the year, the municipal council introduced a by-law for its annual levy which included a special school rate of 281 mills. Before the by-law was passed, ratepayers, plaintiffs in this case, obtained an interim injunction restraining the council from further action on it.

The Public Schools Act<sup>38</sup> provided that trustees might borrow for a site and school house up to \$5,000 on a vote of the majority of ratepayers attending a special meeting called for the purpose. If the amount was greater, then the matter had to be submitted to all ratepayers of the district in the form of a by-law. The Court held that to borrow more than \$5,000 the school board was required to comply strictly with the provisions of the Act. If it were permitted to levy large amounts in a single year, it would be able thereby to evade a hostile vote of ratepayers, the disapproval of the Department of Education and carry out its own plans without restriction. Although Sec. 57(o) of the Act declared it the duty of the trustees to call on the municipal council to levy for current purposes, there must be regard for other sections dealing with the borrowing of money and the creation of debt. Even if they were requested by ratepayers at a meeting to do so, the board could not borrow more than \$5,000 without submitting a by-law for general approval of the ratepayers.

Said Chief Justice Perdue:

As soon as a tax is levied by the municipality, it becomes a debt of the ratepayer on whom the tax is levied. It becomes a lien on his land or personal property having preference over every claim or encumbrance of any party except the Crown... It is not

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<sup>38</sup>R.S.M. 1913, c. 165.



in accordance with the spirit of the Act that this rural school district should be permitted to raise in a single year by taxation of the ratepayers in the district an amount for capital expenditure exceeding \$30,000.<sup>39</sup>

A taxing statute is strictly construed by the courts.

### Liberal Construction of Statutes

On the other hand, statutes are liberally construed when it is clear that justice would not be served by strict adherence to all the technical procedures usually required. Mr. Justice Richards of the New Brunswick Court of Appeal had this to say concerning the operation of rural school districts:

Much of the machinery of our school law is necessarily placed in the hands of those untrained in business, to say nothing of legal experience. The vast majority of boards of school trustees throughout the province must, of necessity, be comprised of those who have had little opportunity for extensive business training. They can have little appreciation of the value of technical or formal requirements. They know how to do things in a common-sense, practical way. And unless we are constrained otherwise by positive and unequivocal legal principles, it is consonant with justice and with reason to place a generous and liberal interpretation on their conduct.<sup>40</sup>

The case of R. v. Mantz<sup>41</sup> in Alberta further illustrates liberal construction even in so precise a section of a statute as that dealing with the election of a school trustee. In an election for a sub-divisional trustee for the Medicine Hat School Division #4 in which defendant won, a number of irregularities were charged. It was alleged that improper notices had been given, that polling places had not been provided in each school district as required, that some persons had voted outside their own

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<sup>39</sup>(1921) 1 W.W.R. 298, at p. 303.

<sup>40</sup>Gunter v. Prince William S.D. Trustees, (1934), 3 D.L.R. 439, at p. 443.

<sup>41</sup>(1948) 2 W.W.R. 143.





districts, that proper election officers had not been appointed, that one poll had been held two miles from the place advertised, that one deputy returning officer was a minor and not qualified to vote and that notices calling for an annual meeting had not been posted in each rural district.

After examining the evidence, Feir, D.C.J., said:

After critical examination of each one of these objections..., I cannot find that in any single one of them is there disclosed such a breach of the Act, or of the principles of a sound election, constituting a denial of the rights of electors, as to lead me to think that the election of the defendant should be set aside. It is well established that the effects of many minor defects on the procedure is not cumulative.<sup>42</sup>

#### Prospective or Retrospective Application of Statutes

Unless there is a clear intention of the legislature to the contrary, a statute operates prospectively and not retroactively. Certain kinds of laws, as for example in the criminal code, cannot be permitted to act retroactively. However, in school legislation, ex post facto laws are to be found. These are usually in the form of curative legislation remedying some defect in an earlier statute, or, for example, they may involve clauses relating to teacher welfare, allowing teachers credit for past teaching experience under new pension laws. Such retroactive provision is not objectionable as long as it is unambiguous. The effect of curative legislation may be illustrated by the following Saskatchewan case:<sup>43</sup>

The board of trustees originally engaged plaintiff teacher in 1934

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<sup>42</sup>Ibid., at p. 150.

<sup>43</sup>Hilkewich v. Laniwci School District, (1937) 2 W.W.R. 386.





for an indefinite period at \$450 per year. The contract was of a continuing nature subject to termination by either party on thirty day's notice. The following year, a new agreement with the same provisions, but at a salary of \$575 per year was signed. During 1936 the majority of the board became dissatisfied with the teacher's services and the school inspector, hearing of the disagreement, instructed the secretary-treasurer to call a special meeting on May 28 to consider the difficulty. The trustees, secretary-treasurer, inspector and teacher were present at the meeting. After some discussion, the board passed a resolution dismissing the teacher. Notice of dismissal was served on her the following day, May 29. The teacher, feeling that the dismissal was invalid, continued to teach until June 29, although the board had engaged another teacher on June 13. On June 29, when she arrived at school she found the new teacher in the classroom and also two of the trustees present who prevented her from entering and teaching. She then brought action to recover salary for the days she had taught between June 13 and June 29 and also for damages amounting to one month's salary in lieu of proper notice of termination of contract.

At the trial it was determined that both meetings of the board--the one at which the contract was signed and the one at which the agreement was terminated--had been illegal for want of two clear day's notice as required by the Act. Since the notice had not been given, and the trustees had not signed waivers of notice, the resolutions passed at the meetings were invalid, and consequently no legal contract existed between the parties. The action was dismissed and appealed by the teacher.

The Appeal Court held that the resolutions were indeed invalid



for want of notice of meeting. However, three days before the beginning of the hearing on the appeal, an amendment to The School Act was passed by the legislature and given royal assent, providing that any irregularity in calling a board meeting, or proceedings thereat, should not prevent the teacher's recovering salary due him under the contract entered into at such a meeting. The provisions of the amendment were clearly retrospective. Plaintiff was allowed to recover, for under the amendment, the contract was good. In fact, there had been no dismissal because of the irregularity of the meeting purporting to dismiss her. The intent of the legislature had been to exempt teachers' contracts from the limitations applied to other contracts, namely that they be made only by strictly following statutory procedure.

### Interpretation Acts

All Canadian provinces have Interpretation Acts which contain many of the rules of statutory construction discussed above. Their most important provision, however, states that all statutes are deemed to be remedial and are to be construed liberally. As illustrated above and throughout this study, the Courts do not always pay attention to this provision.

### V. Bringing a Civil Action to Trial<sup>44</sup>

The law relating to matters other than crime is referred to as the civil law, and actions other than criminal trials are civil actions. Civil actions may be at "law" or in "equity" although the two are merged in modern court procedure in Canada. A successful law action results in damages for the injured party, while an equity suit results in a court

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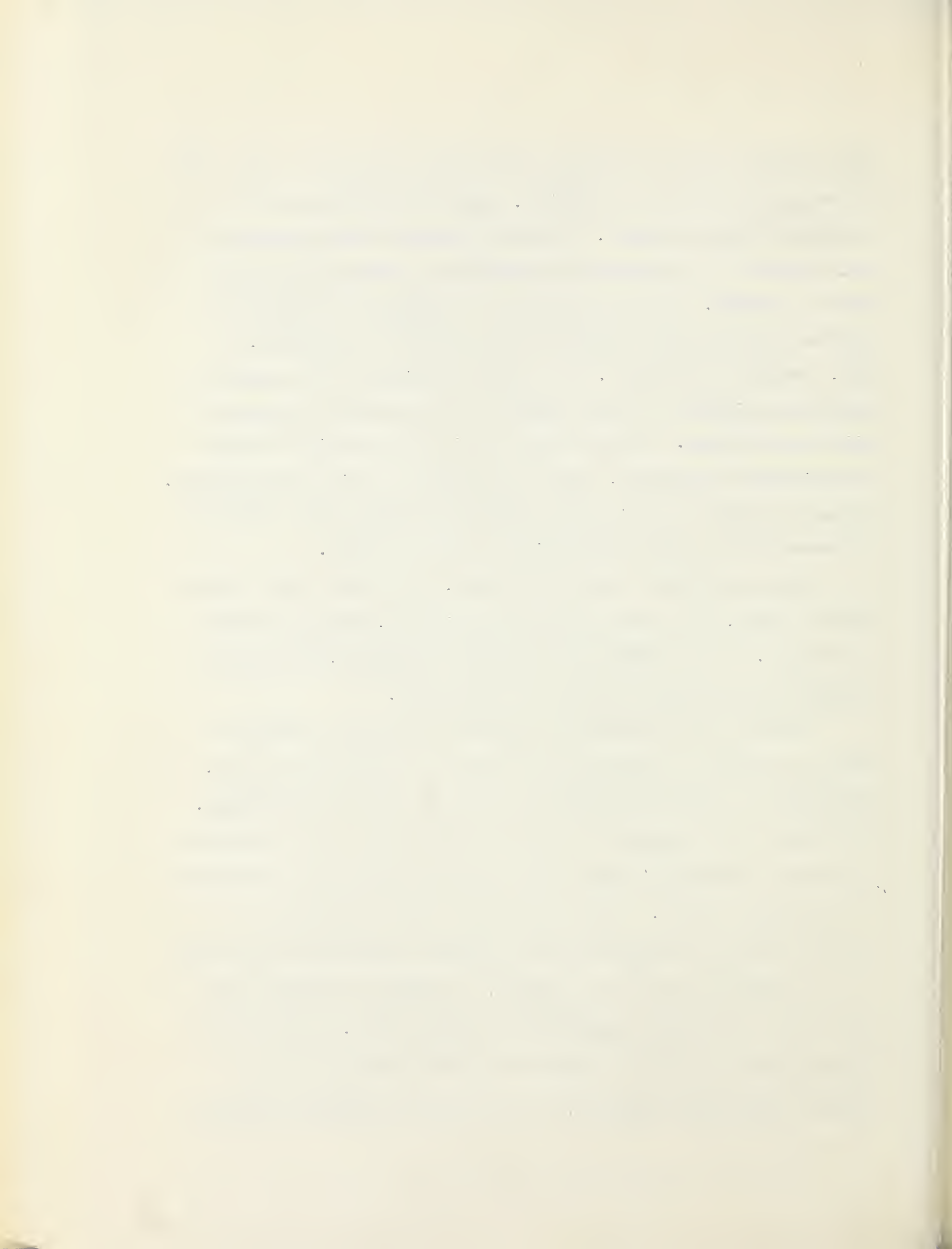
<sup>44</sup>Peter Archer, *Op. Cit.*, pp. 173-180.



order or decree, either of specific performance or injunction. Law actions may be in tort or in contract. Breach of contract may be remedied by suit for damages. A tort is a breach of duty imposed by law, committed upon the person or property of an individual and which results in damage. It is a wrongful act consisting of a commission or omission by which another receives injury directly or indirectly, in body, property or reputation. The person who brings a civil action is called the plaintiff; the person against whom the action is brought is called the defendant. In some types of action the plaintiff is called the petitioner or applicant, while the defendant is called the respondent. The court in which the action takes place is the trial court, from which the unsuccessful litigant may appeal to a court of appeal.

When an actionable event has occurred, it is usual, before bringing it to trial, to select a solicitor and with him, attempt to effect a settlement. If the parties fail to reach a settlement, the complaining party must then decide whether to bring action.

Plaintiff first delivers his "statement of claim" in which he sets out in detail the facts which he alleges in support of his claim. The original is filed in the Court and a copy is sent to the defendant. The purpose of the statement of claim is to make clear to all concerned, the grounds of plaintiff's case, and to warn defendant of the allegations he must prepare to meet. Every material fact must be specified, for plaintiff will not be permitted at the hearing to advance any allegations of which defendant has not been notified. He need not, however, state his evidence nor the legal conclusions he seeks to draw. It is assumed that the conclusions will be apparent to the Court and also to the defendant and his legal advisers. It is, however, considered unethical,





or at least discourteous, to plead in such a way as to mislead, and in any event, little would be gained because the Court will see that defendant has a fair opportunity to argue the claim actually being made by plaintiff. Hence facts and details should be comprehensive enough to enable defendant to collect his evidence and prepare his defence.

If a statement of claim is too vague or ambiguous to establish grounds for legitimate action, defendant may apply to have it "struck out," in which case plaintiff must provide an entirely new statement of claim. If the original statement is not so defective as to cause its being struck out, defendant may require "more and better particulars"; that is, the missing details. By this procedure, plaintiff is tied to a definite story.

When he receives the statement of claim, defendant must make clear his version of the dispute, which he does in a document called a "statement of defence." This document sets out his version of the facts just as does the statement of claim for plaintiff. If he denies an allegation, defendant must say so, for any fact not denied is considered by the Court to be admitted. Defendant may, in the preparation of his defence, allege new facts, and plaintiff has the privilege of moving that they be struck out or alternatively, he may ask for further and better particulars.

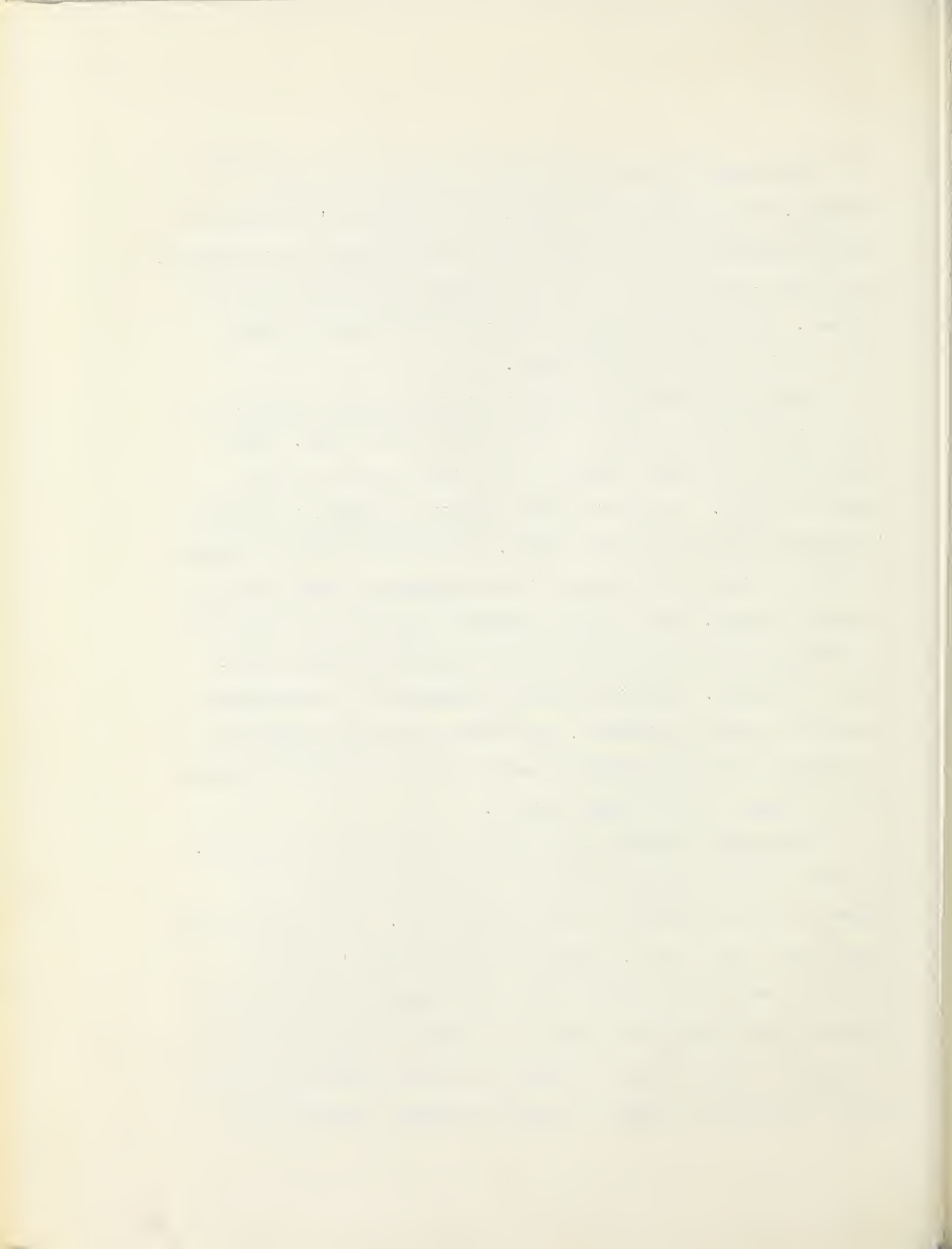
If plaintiff wishes to raise still other allegations in answer to those raised by the defendant, he may do so in a document called a "reply." The process of raising allegations and answering them continues until each party has raised all the pertinent and relevant points, and the issues are clear to all. If the defendant not only denies the plaintiff's allegations, but asserts a claim of his own, he files a counter claim which goes through the same procedure as above.



The documents involved in the above procedures are called pleadings. When pleadings have closed, each of plaintiff's allegations has been formulated and it is known which of them defendant will challenge. The precise questions are clear to both parties and each can marshal his evidence. The Court also has its attention drawn directly to matters which it will be called upon to decide.

Originally pleadings were made in highly technical language, and a case might be lost because of a minor slip in drawing them. Today they are made in everyday language to give clear indication of the points in dispute. Although the facts must all be pleaded, the evidence to support the facts may be kept secret. However, each party may require the other to disclose all documents in his possession, whether they help or hinder his case. Each party may therefore examine and take copies of any documents concerning the case, as for example any letters, notes, bills or contracts. Each side is then in possession of the documentary evidence which may be introduced. The matter of how this evidence will be presented to make the strongest possible case then becomes the problem of the litigants and their legal advisers.

In addition to pleadings, there is the examination for discovery. On a given date the litigants and their legal advisers meet for the purpose of further clarifying the issues in dispute. This meeting is less formal than a court hearing. Counsel may ask each other's clients questions deemed pertinent to the case. If a question is thought to be improper, counsel advises his client not to answer. Opposing counsel then consults a judge who rules on whether or not the question was proper and the individual is directed to answer accordingly. Questions and



answers are recorded and parts of this record may be read into the evidence at the actual hearing.

The chief advantage of pleadings is to define the issues. Each party can make clear what facts he doesn't dispute and the opponent is spared the expense of getting evidence on these facts. Since either party may have the costs of the action assessed against him, this is to their mutual advantage. When facts are beyond reasonable dispute, either party may serve on the other "notice to admit" to them, again saving the expense of collecting evidence.

The disagreement between litigants may be either of fact or of law. In the first, defendant admits that if plaintiff's version of the facts were true, then the legal consequences which he suggests, would follow; however, he disputes that version of the facts. In the second, defendant admits the given version of facts but he disputes the legal consequences suggested by plaintiff. The Court must, therefore, determine first of all what were the true facts and then what legal consequences result. Thus is emphasized the necessity for each party to have opportunity to state his case, and to select and present those matters which are relevant.

Finally, when all the preliminaries have been completed, the case is "set down" to await its turn for a hearing. The procedure is long, involved and expensive, and therefore tends to discourage frivolous litigation. Besides this, of course, it is a necessary procedure, for the issues must be clear; the allegations must be relevant; each of the disputants should have fair warning of the case, its facts and the documents involved. Only then can justice be fairly served. There is also a further possibility. If during the long, complex procedure





or waiting period before the hearing, it is found that no real dispute exists and an out-of-court settlement is effected, so much the better.

## VI. The Trial of a Civil Action<sup>45</sup>

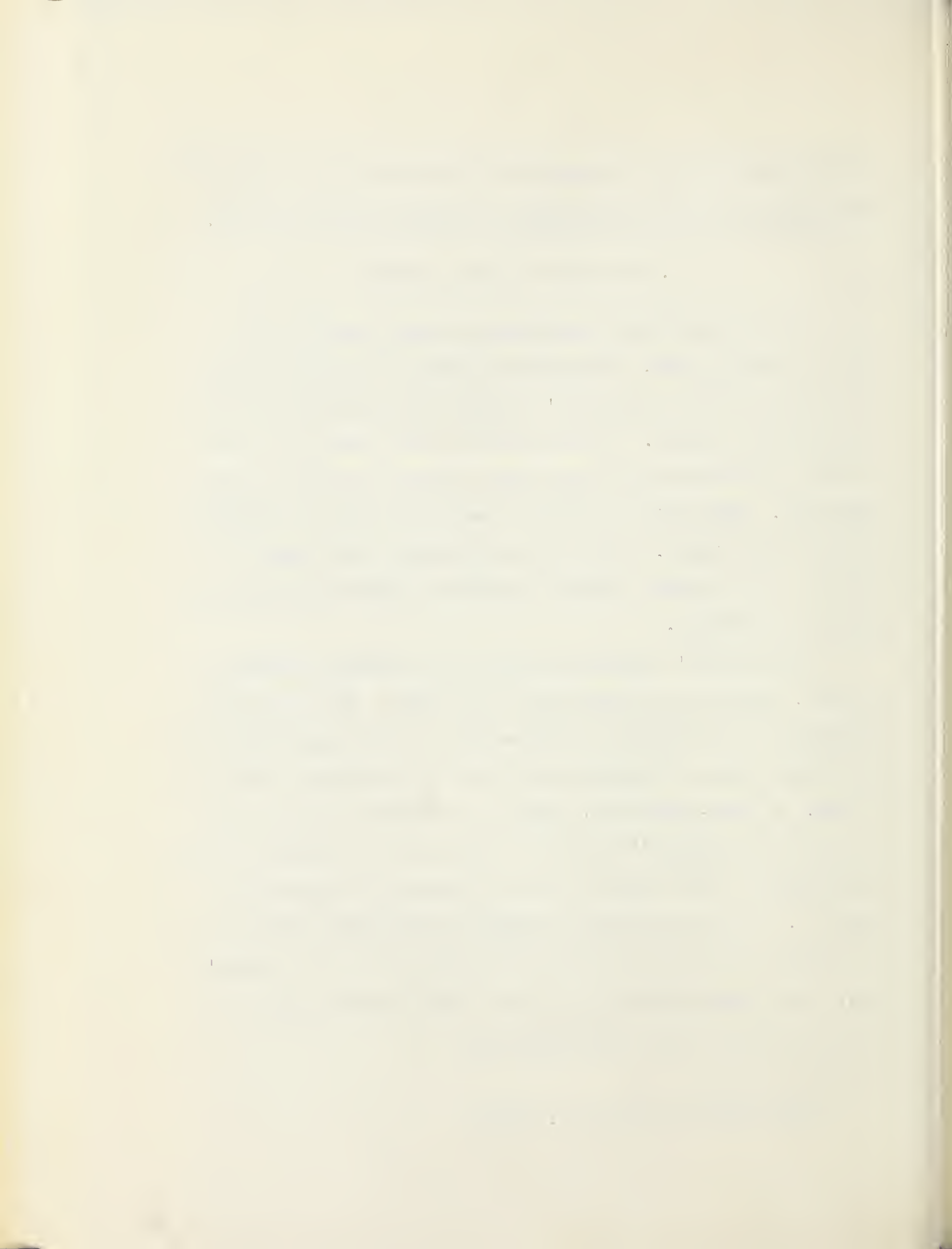
When the case finally comes before the Court, counsel for the plaintiff opens the case. He explains the matters in dispute and reads the pleadings, outlining plaintiff's argument and indicating how it will be supported by evidence. He then calls the first witness who is sworn in, since all evidence must be given under oath and is subject to cross-examination. Presentation of evidence proceeds by a series of questions directed to the witness. Counsel is not permitted to ask leading questions. Nor is hearsay evidence accepted; the witness may speak only from his own knowledge.

When plaintiff's counsel has asked all the necessary questions of a witness, counsel for the defence may cross-examine. The aim of cross-examination is to discredit the evidence given by showing that the witness was mistaken, lying, or that other facts alter the importance of what he has said. On cross-examination, counsel also attempts to establish any facts which help defendant's case. All evidence must be produced in court in the presence of both parties so that the opponent has opportunity to counter it. In cross-examination, counsel may ask leading questions on the principle that defendant did not ask the Court to hear the witness's story. After cross-examination, the next witness is called, and so on until plaintiff has built up his entire case.

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<sup>45</sup>Peter Archer, Op. Cit., pp. 183-88.





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When the last witness has been examined, defendant attempts to refute plaintiff's case. If it has gone badly, defendant may submit to the Court that there is, in fact, no case, for plaintiff must have produced enough evidence to make his case plausible. If the Court agrees, the case may be dismissed in favor of the defendant. If, however, the Court rejects the submission, judgment may be automatically entered for plaintiff, defendant being given no opportunity to present his defence, though this is not a universal rule. In following this procedure defendant may deny plaintiff the opportunity of cross-examining his witnesses, but at the same time, he must accept the risk involved. If defendant is required or elects to call evidence, he proceeds in a way similar to what has been described of plaintiff's presentation.

When all the evidence is in, each side has the right to argue the conclusions that should be drawn. First defendant's counsel may point out where plaintiff's case broke down, and also argue questions of law which have been raised. Then plaintiff's counsel presents his version.

During the course of the trial the judge may have said very little. Theoretically, he knows only what has gone in the court together with the answers to questions of clarification which he may have asked. During the closing speeches by counsel, the judge may point out to each the weak points of his case, and each is given a chance to answer to these statements. It would be unjust to enter judgment against a litigant on a point to which his attention had not been drawn and which he may not have realized needed clarification.

The judge then considers the evidence. If there is a jury, he explains points of law which have been in dispute, tells them what matters

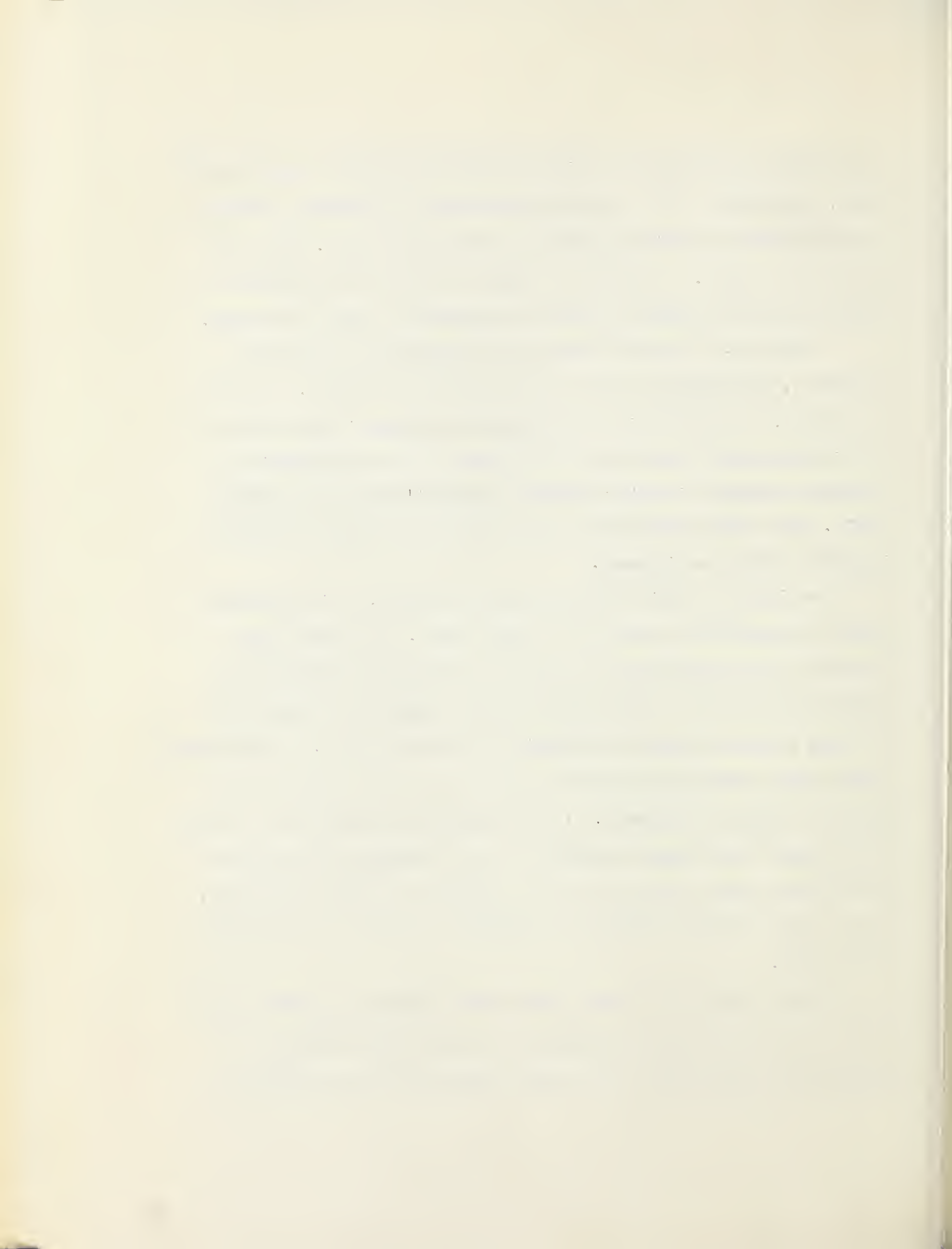


of fact they must decide and reviews for them the evidence that has been given. On matters of law, the jury must accept his direction, but they are not bound by his interpretation or conclusions of fact. They are the finders of fact. If there is no jury, the Court is the finder of fact and gives its judgment stating the reasoning on which it is based.

There are, of course, numerous minor variations of the above procedures, but fundamental rules are observed by all Courts. The rules of evidence, the presentation of argument and evidence in the presence of the disputing party where it may be challenged, and the prohibition of irrelevant matters which might prejudice opponent's case, are strictly upheld. Each side presents its case and the Court attempts to make an impartial decision or judgment.

The loser in a Trial Court may appeal the case, or if the other party is dissatisfied, he may file a cross appeal. The Appeal Court reviews all the proceedings of the trial, including the evidence, the judgment given and the reasons upon which the judgment is based. This Court may affirm or reverse the decision of the Court below. On affirmation, further legal grounds may be added to those of the trial judge, or the appeal may simply be dismissed. If the judgment is reversed, the justices of the Appeal Court usually consider the legal questions and precedents involved with great care, and give their opinions in written statements. If one or more justices dissent, the decision is carried by the majority of the Court.

Trial Courts do not always record their opinions, and often decide cases without giving written opinions. Thus, many cases which are not appealed are recorded only in the court records and are not available to



the public, and even if he gives a written opinion it may not be published. Appellate Courts do record their decisions and generally give written opinions which are published in the law reports. These decisions are carefully studied by lawyers and judges for they constitute the case law in the establishment of precedents. Such a judgment remains as a precedent within the jurisdiction of the Court until it is overruled or until it is reversed by a higher court to which appeal may be taken. However, a Court in another jurisdiction is also free to follow the decision, and may be influenced by the reasoning of the prevailing judicial views.

## VII. School Law and the Courts

School law in Canada is to be found chiefly in the School Acts of the various provincial legislatures, which Acts are subject to the provisions of Sec. 93 of the B.N.A. Act and the federal Acts admitting provinces to confederation. Specific sections of the School Acts may bring school legislation within the provisions of other Acts as for example Municipal Acts, Election Acts, Public Authorities Protection Acts. In addition, it is presumed that the general law of contracts, the rules of the common law and of equity also apply.

Legal problems arising out of school legislation present some difficulty. Each of the provinces has established a somewhat different framework within which school boards function, and in regard to their relations with other government bodies both at the local and central levels. Furthermore, the provincial courts have jurisdiction only within provincial boundaries and thus legal precedents applicable to the whole





of Canada are rare, except in those instances involving general common law principles, cases involving common legislation in which judgments in one province would be acceptable in another, or rulings of the Supreme Court of Canada on similar provisions in statutes. Hence where no more than interpretation of legislation is involved, it is difficult to establish legal rules of general applicability.

A further complicating factor in interpreting school law, and case law applying to school administration, is the fact that school legislation changes so frequently. Almost annually extensive amendments are made to existing School Acts, and the lag of consolidation of statutes makes it difficult to find the statutory provisions currently in force. Added to this, some provinces have a number of Acts referring to schools. As Chief Justice Robertson of Ontario said in 1940:

One approaches with considerable caution any question which involves interpretation of school laws. The governing statutes are not only intricate, but they are subject to frequent amendment... A number of amendments...are made retroactive...It is with becoming humility then, that one puts forward an opinion based on these statutes, which are the special field of many gentlemen of learning who are engaged in their operation.<sup>46</sup>

An illustration of the extent to which school legislation may change is given by the case of Re East York Public School Board and MacKenzie.<sup>47</sup> Respondent was a teacher regularly elected to the school board. At the time of her election on January 1, 1930, she was not

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<sup>46</sup>Murray and Brighton Public School Trustees v. Northumberland and Durham (1940) 2 D.L.R. 28, at p. 30.

<sup>47</sup>O.W.N. 84, (1931) 2 D.L.R. 558.



employed as a teacher, but in November of that year she was engaged by the board of the neighboring school district of Scarborough as a temporary teacher of an auxiliary class which she taught, without a formal contract, until January 30, 1931. Sec. 133 of The Public Schools Act<sup>48</sup> prohibited a teacher from becoming a trustee and therefore the East York Board submitted the question of her membership on the board to a Court. The Court held that a teacher board member had ipso facto vacated her seat when she began to teach, and that she could not resume it unless re-elected on the cessation of her teaching.

This provision of the Act of 1927 was amended in 1950 to confine the disqualification to the board employing the teacher or to any board having jurisdiction in the whole or any part of the area. That is, a teacher could not be a member of a high school board while being employed by a public school board within the area of the high school board's jurisdiction. In 1954 the provision was repealed in so far as the Public Schools Act was concerned, and was substantially re-enacted in the Schools Administration Act.<sup>49</sup> The case would today be decided the other way.

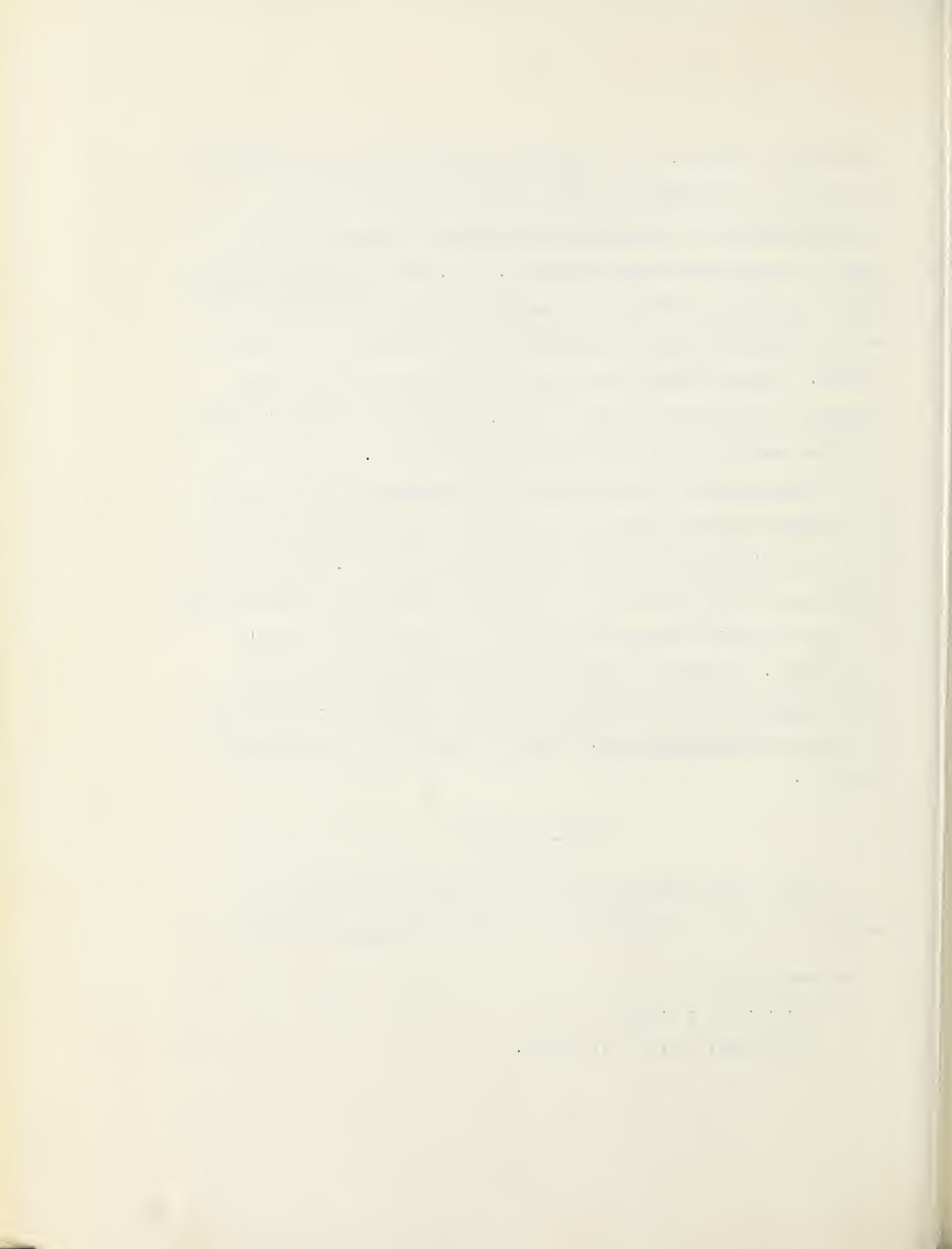
#### VIII. Summary

School board functions fall into the broad classification of government activity, and therefore, like other government functions, are

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<sup>48</sup>R.S.O. 1927, c. 323.

<sup>49</sup>1954 (Ont.), c. 86, s. 42 (2).



subject to the rule of law. The law, enforced by the Courts, consists mainly of the positive law, which in turn, comprises statutes and common law and equitable principles found in judicial decisions. Though not a direct part of the system of law applied by the Courts, the natural law is a source of ideas of justice which tend to influence their actual operation.

The legal system of Canada, just as that of many other English speaking nations, is derived largely from the laws of England. These laws have their origins in such early legal developments as custom, the common law and equity. As the society has grown, its law has had to keep pace, but judicial or case law alone has not been able to do so. Consequently, today legislation is an important source of law.

Case law, being judge made, can be adapted readily to changing social and economic conditions. However, in the midst of change, the law must have a measure of certainty and permanence. This is provided in the doctrine of precedent, and the hierarchy of authority of the Courts. A decision of a higher Court, though subject to change by one of superior jurisdiction, is binding on one of lower jurisdiction, thereby providing not only that similar questions will be treated in similar ways, but also providing a form of supervision by superior over inferior Courts.

Statutes are construed by the Courts according to definite principles. If the language of the statute is not clear, the Court attempts to discover the intent of the legislature. Meanings of the terms are derived from the statute itself rather than from extraneous sources, and the language is interpreted according to literal meanings of terms used. Some sections of statute, especially those which provide for interference with individual rights, are strictly construed. Other sections may be more liberally





construed, particularly when justice can best be served by doing so. Ordinarily, the presumption is that the common law is not altered by statutory provisions, unless the intention of the legislature to do so is clear. Statutes are usually considered to act prospectively rather than retrospectively. Throughout, the Courts attempt to see that the intent of the legislature is followed, and the public interest served.

Formalities preliminary to a civil action in court may seem to the casual observer to be tedious and cumbersome. Each step, however, has been developed to insure that justice will prevail and to prevent either of the litigants taking unfair advantage. If the procedure is time consuming and therefore expensive, it tends to discourage frivolous litigation. The lengthy process encourages litigants, whose differences are not so deeply rooted that they cannot compromise, to settle out of court. This frees the time of Courts to deal with the more significant disputes that come before them.

Study of litigation in relation to school matters presents a number of difficulties. School statutes of some provinces are exceedingly complex, a complexity which is increased by frequent revision and lag in consolidation of the statutes. Complex statutes may actually increase the amount of litigation, for when provisions of the law are involved or unclear, the Courts are more frequently called upon to give clarification. The fact that education is a provincial matter, resulting in varying provincial statutes, makes it difficult to draw general principles from cases which have been before the Courts. However, it is possible to make some generalizations, especially when the judgments of the Courts agree with principles widely accepted in school administration.





## CHAPTER III

### THE SCHOOL BOARD -- A CORPORATION

#### A. Introduction

The school board is a corporation. However, because it must be carefully distinguished from the municipal corporation, it has been variously called a public corporation, a statutory corporation, or a quasi-municipal corporation. It is reasonable to infer that because public school boards and public school districts are relatively recent innovations in the sphere of local government, their legal status has been derived from a modification of legal theory relating to municipal corporations which are of ancient origin. To distinguish the school corporation from the municipal corporation it is necessary to examine the functions of each.

In its elemental sense the municipal corporation is a local public corporation, whose purpose is to govern the affairs of the area under its jurisdiction. It is the product of action by a legislative body rather than of the local people themselves. It is distinguished from other public corporations by its power of local legislation; it differs from a private corporation in its objectives and the purposes of its incorporation. A municipal corporation has been defined as:<sup>1</sup>

A body corporate constituted by the incorporation of the inhabitants residing within a defined area, upon whom the legislature has, either directly or through some intermediate agency conferred corporate status, rights and liabilities,

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<sup>1</sup>Canadian Encyclopaedic Digest: Toronto: Borroughs and Co., 1931, p. 682.



including the right to administer through the agency of an elected council or other governing body such matters of local concern as are either expressly specified or as are necessarily implied from the nature and extent of the authority conferred.

Although the school board also enjoys corporate status, it is not to be considered a municipal corporation. Rather, American Courts have held that "a school district is a quasi-municipal corporation."<sup>2</sup> The municipal corporation has a dual function: private or proprietary and governmental, whereas the quasi-municipal corporation has only a governmental function, that of education. The school board as a quasi-municipal corporation acts as the agency of the central authority for the sole purpose of furnishing educational facilities and administering the public education system. As a public corporation it has the most limited powers known to law.<sup>3</sup>

Having no proprietary function, the school corporation cannot carry on business activities with a view to defraying the costs of its services. Unlike the municipal corporation it cannot operate utilities for a profit and use the proceeds for its operations. It can exercise only those powers granted by statute or derived by necessary implication from the duties assigned to it. The only business operations it may engage in are those explicitly permitted by statute and directly connected with, or necessary for, carrying out its duties. Thus a Tennessee Court has ruled that a statute giving a school board authority to transport pupils, did not permit it to provide transportation for teachers, and that in the

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<sup>2</sup>L. O. Garber, The Yearbook of School Law. Danville, Ill.: Interstate Printers and Publishers. 1957. p. 13.

<sup>3</sup>Ibid., 1956, pp. 8-9.



absence of such statutory permission, the board was prohibited from doing so.<sup>4</sup>

A Canadian authority<sup>5</sup> makes a similar distinction between municipal corporations and school boards. Public and quasi-municipal corporations perform functions more governmental than municipal. They have been created by legislatures to administer provincial laws on the theory that territorial division makes for more efficient government than can be provided by complete centralization. These corporations have no identity of their own, being completely dependent on the creating statutes for their powers and duties. Because of this they do not have the inherent characteristics nor the incidental powers of municipal corporations, and are confined to the exercise of the express powers vested in them. Only in a narrow sense are they self-governing.

The weight of judicial authority is that a school board is a corporation, limited though its jurisdiction may be, and therefore, it is subject to the law as it pertains to corporations. But the board is also a public authority,<sup>6</sup> that is, a body which has public or statutory duties to perform and which carries out those duties for the benefit of the public rather than for private gain. As such it is also subject to law applying to public authorities. The remainder of this chapter is

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<sup>4</sup>Ibid., p. 8.

<sup>5</sup>I. M. Rogers, The Law of Canadian Municipal Corporations. Toronto: Carswell Co. Ltd. 1959. p. 12.

<sup>6</sup>Rt. Hon. Lord Simonds (ed.) Halsbury's Laws of England, 3rd edition. London: Butterworth & Co. (Publishers) Ltd. Vol. 30, p. 682.







devoted to examining the corporate nature of the school board and its status as a public authority.

## B. Corporations

The following statements regarding the corporate status of school boards are representative of the provisions of provincial statutes.

In each district, unless otherwise provided by this Act, there shall be a board of trustees, and the members of the board are a corporation under the name of "The Board of Trustees of \_\_\_\_\_ School District No. \_\_\_\_" and shall have a common seal.<sup>7</sup>

The members of the board of a division are a corporation under the name of "The Board of the \_\_\_\_\_ School Division No. \_\_\_\_" and shall have a common seal.<sup>8</sup>

The trustees elected or appointed under this Act for each school district and their successors in office shall constitute a Board of School Trustees for the District, and, under the name of "The Board of School Trustees of School District No. 61 (Greater Victoria)" (or as the name of the school district may be), shall be a body politic and corporate with perpetual succession and a common seal, having the rights, powers, duties and liabilities set forth in this Act.<sup>9</sup>

With its corporate status so clearly designated, it is necessary to distinguish the school board from other types of corporations. Distinction has already been drawn between it and the municipal corporation. As was indicated in Chapter II, there are two chief classes of corporations--the corporation sole, and the corporation aggregate. The latter class, into which the school board falls, is made up of the further

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<sup>7</sup>The School Act (Alta) 1957, c. 297, s. 74.

<sup>8</sup>Ibid., s. 76(2).

<sup>9</sup>The Public Schools Act, (B.C.) 1958, c. 42, s. 89(1).



sub-classes of ecclesiastical and lay corporations. The sub-class of lay corporations is comprised of trading and non-trading corporations. Of these the school board is a non-trading corporation having certain statutory powers of local government. Thus the board is a lay corporation aggregate, of non-trading nature. As such it is also distinguished in law from partnerships, voluntary societies, lodges or mutual associations, none of which are corporations.

### Definition of a Corporation

A corporation aggregate has been defined as:

a collection of individuals united into one body under a special denomination, having perpetual succession under an artificial form, and vested by the policy of the law with the capacity of acting in several respects as an individual, particularly of taking and granting property, of contracting obligations and of suing and being sued, of enjoying privileges and immunities in common, and of exercising a variety of political rights, more or less extensive, according to the design of its institution, or the powers conferred upon it, whether at the time of its creation or at any subsequent period of its existence.<sup>10</sup>

A further definition of a corporation was given by Chief Justice Marshall of the United States and quoted in an Ontario case. Though less inclusive it further amplifies the statement above.

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being a mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence.<sup>11</sup>

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<sup>10</sup>9 Halsbury, Op. Cit., p. 4.

<sup>11</sup>Murray and Brighton Public School Trustees v. Northumberland and Durham (1939) O.W.N. 565, at p. 566.



I. Creation of the Corporation<sup>12</sup>

The school corporation is created by statute. In essence there are five essentials necessary for incorporation. There must be lawful authority to do so; there must be persons to incorporate; there must be a name by which they are incorporated; there must be a place to which the corporation belongs; there must be words of incorporation sufficient in law. These conditions are, of course, met in the erection of a school district and election of a board of trustees. The creating statute is a general one, laying out the requirements for establishment of school districts and corporate boards, and any number of corporations may be formed under it. No particular wording is required for their formation; the intention to do so and compliance with the requirements is sufficient.

When incorporation occurs by an Act of the legislature, that Act becomes the constitution of the corporation, declaring its rights and powers and prescribing its duties and obligations. A statutory constitution can be extended, restricted or revoked by Act of the legislature. In so far as the school corporation is concerned, controlling legislation is amended frequently to extend new powers, assign new duties or to restrict existing powers.

The membership of the corporation is designated by its constitution, as is qualification for membership. School Acts may require, among other things, ability to read and write, residence or property ownership. Although anyone satisfying the qualifications may become a member on valid election, no-one may be made a member without his consent.

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<sup>12</sup>9 Halsbury, Op. Cit., pp. 19-30.





## II. Some Important Characteristics of Corporations

### Name of the Corporation

Every corporation must have a name which is usually expressed or implied in the creating statute, but which in any event, must be sanctioned by the legislature. The corporation aggregate acts only in its own name, without necessarily showing the names of its members, though it may be authorized by statute to sue and be sued in the name of one of its officers. The name of the corporation may be changed by Act of the legislature without changing its rights or obligations.

The effect of changes in a corporation is aptly illustrated by Canada Permanent Loan Co. v. Donore.<sup>13</sup> In this case plaintiff company held debentures issued by the original school district of Donore. Since that time the school district boundaries had been altered three times in accordance with statutory powers vested in the municipality. The Court held that alteration of a school district involved only a change in the corporation but not its destruction, and the degree of alteration was not a test of the preservation of the corporate identity. Even without change in boundaries many changes would have taken place--people might have moved to or from the district, land might have changed ownership, tax-exempt property such as crown lands might have changed status. Even the name might have changed, but none of these would alter the existence of the

Said Mr. Justice Killam:

It is evident, then, that it was quite possible to maintain throughout the same corporation, while by successive changes, entirely altering the territory from which it drew its revenues,

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<sup>13</sup>(1896) 11 Man. R. 120.





the personnel of the ratepayers, the schools over which the trustees exercised control, and yet do injustice to no person. While to allow such territorial changes, great or small, to effect the dissolution of the school corporations, or the shifting of their liabilities from one corporation to another, by reference to the uncertain criterion of the extent of the changes, would contravene the evident purpose of the Legislature in creating the corporations.<sup>14</sup>

...In this case it seems to me that the intent of the legislature in creating the corporations has been the maintenance of permanent bodies for the preservation of obligations and contracts, that the presumption should be against an intent to commit to subordinate bodies the power to annihilate these, and that there appears throughout this course of legislation and the official acts of subordinate authorities an intention to preserve the corporate bodies and their liabilities.<sup>15</sup>

Although its name is essential, misnomer is not necessarily fatal to actions by and against the corporation. A grant made to the corporation in the wrong name is not bad so long as the intention of the grantor is clear. Nor can the corporation take advantage of its own misnomer in an obligation which it has contracted and which it may wish to abrogate. Misnomer in legal proceedings may be rectified by amendment to pleadings unless identification is sufficiently clear otherwise. Thus in Sleeman v. Foothills School Division<sup>16</sup> the Court held that though defendant corporation was not quite correctly named in the action, its identity was clear and therefore amendment of the name in the pleadings was allowed.

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<sup>14</sup>Ibid., at p. 129.

<sup>15</sup>Ibid., at p. 130.

<sup>16</sup>(1946) 1 W.W.R. 145 (Alta.).



### Location of the Corporation

In addition to its name, the school corporation must be of some specific place; that is, it must belong to a definite locality. This aspect of corporation law applies especially to corporations with some local jurisdiction, or powers and duties which are connected with a particular locality. Thus a school board must be connected with a definite school district, boundaries of which must be clear and precise. The case of Re. Simmons and Chatham<sup>17</sup> shows the necessity of definiteness in stating the boundaries of a school district. In 1854 a township council had established a school district for colored people. The limits of the section were undefined, simply providing that all lands owned by colored people were to comprise the school district. The Court held that such a by-law was illegal in that there were no fixed boundaries. The by-law could not legally establish boundaries that fluctuated as colored people moved to or from the district. Under such circumstances, the limits of the district could not be ascertained and known at any point of time. Therefore the by-law was quashed.

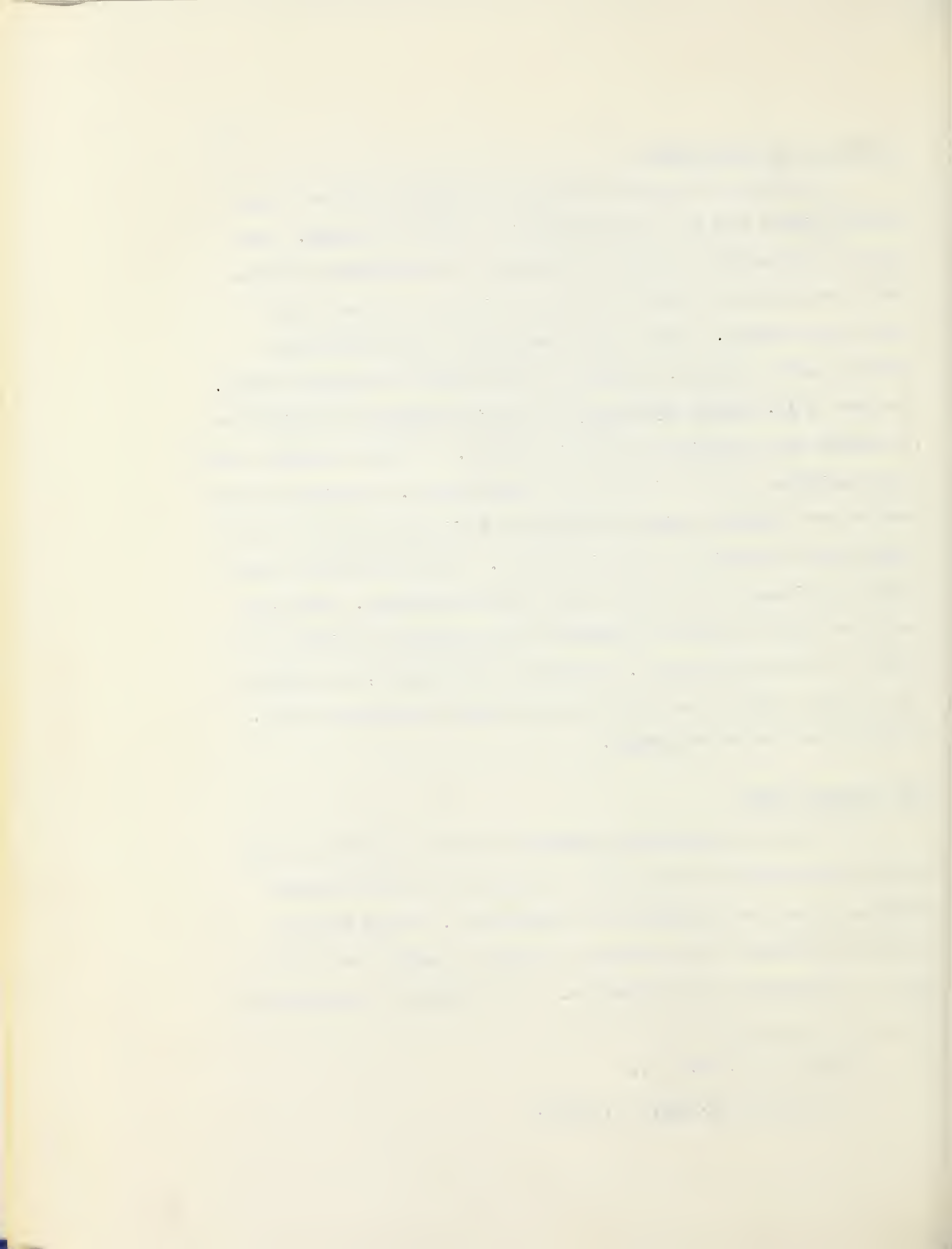
### The Corporate Seal<sup>18</sup>

As a rule the corporation aggregate can act or express its will only by a deed under its common seal, for this is the only authentic evidence of what the corporation has agreed to do. Unless there is statutory provision to the contrary, the power to possess and use the seal is incidental to the corporation. It is evidence of incorporation,

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<sup>17</sup>(1861) 21 U.C.Q.B. 75.

<sup>18</sup>9 Halsbury, Op. Cit., pp. 13-15.



and lack of a seal is evidence of not being incorporated, though neither of these is conclusive evidence. If the constitution, or statute, requires a special method of executing its deeds, or prescribes particular formalities to be observed in affixing the corporate seal, a deed must be executed in the prescribed manner to be completely binding.

If the corporate seal appears on a legal deed, affixed by persons empowered to do so, it is presumed, in the absence of evidence to the contrary, that the necessary formalities were observed. Although the corporation may set aside its own act by showing that the affixing of the seal was unauthorized or irregular, it can do so only on the clearest of evidence. If the deed is good on its face--it is sealed, within the powers of the corporation and the necessary formalities have been observed--but is defective because of a technicality resulting from internal management of the corporation (as when the secretary forgets to record the action in the minutes) the corporation will not be permitted thereby to take advantage of someone who has contracted with it in good faith without noticing the defect.

Some of the formalities which it is necessary for the school board to observe for proper use of the corporate seal are: the meeting must have been properly called according to statutory provisions, and the seal must have been affixed pursuant to a resolution of the board.

The seal has been held essential in binding the school board in a number of cases. In an early Ontario case<sup>19</sup> a school house had been

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<sup>19</sup>Marshall and Kitley School Trustees (1855) 4 U.C.C.P. 373.







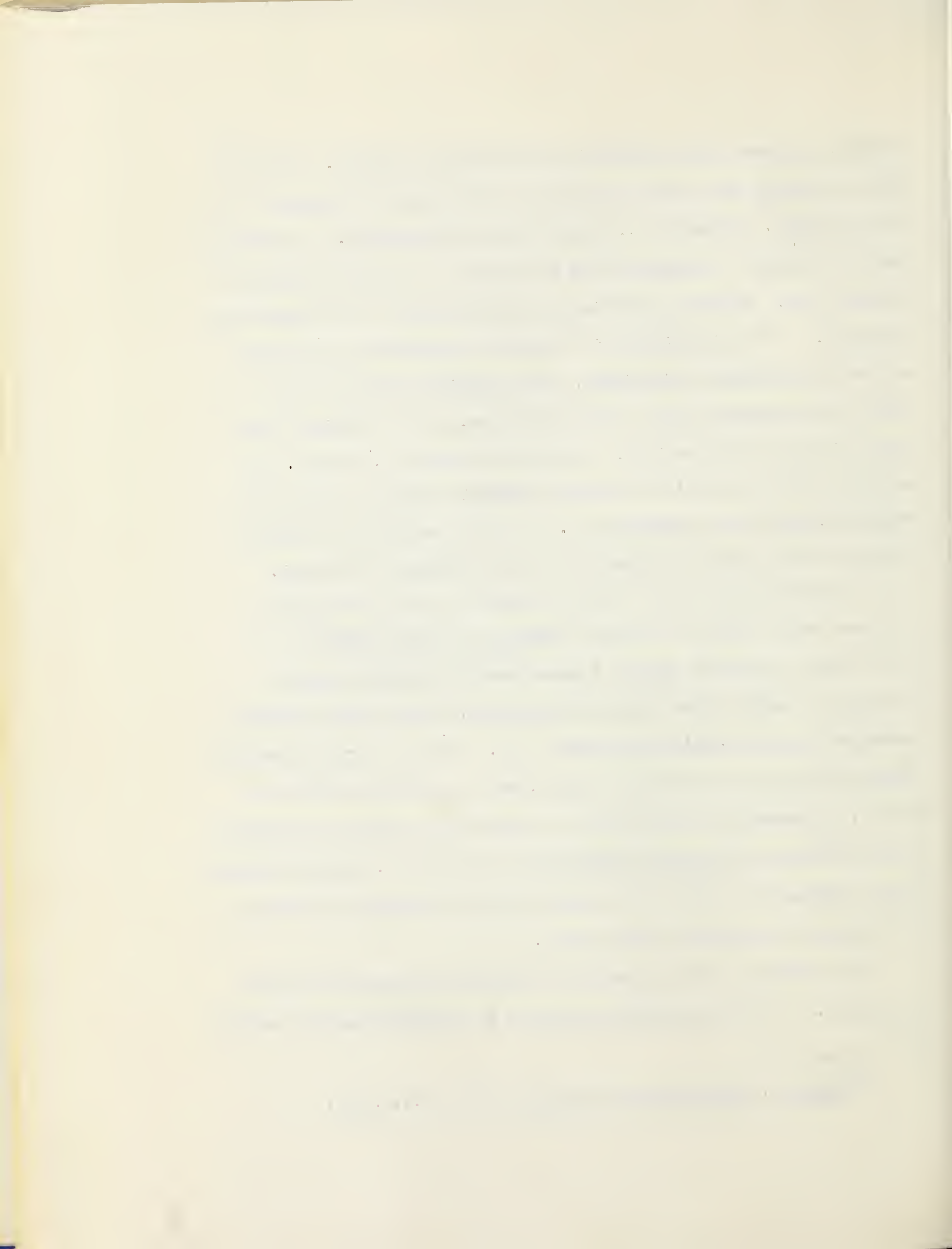
erected, the board taking possession and using the building. But the board maintained that it was not liable to pay because the contract was not under seal. Richards, J., ruled in favor of the board. He indicated that so important a contract as for the erection of a school house must be under seal. The seal authenticates the concurrence of the whole body corporate. If the legislature in erecting a corporation had invested any member, expressly or impliedly, with authority to bind the whole body by his signature alone, or by other means, then the adding of the seal would be a mere formality. This had not been done, however. The corporate seal was held to be the only authentic evidence of what the corporation had done or agreed to do. Even the resolution of a fully attended meeting could not substitute for the affixing of the seal.

A Manitoba Court gave a similar ruling as to the need for the corporate seal to make the contract binding on the corporation.<sup>20</sup> In this instance a domestic science teacher regularly employed, agreed afterward to perform extra duties for extra pay, but no formal agreement concerning the extra duties was entered into. When the board subsequently rejected her claim for additional salary, and she instituted action to recover, the Court held that unless the contract was under seal according to the provisions of The Public Schools Act, it was void. Injustice arising from so reading the statute was a matter for the legislature to rectify, and could not be corrected in the courts.

The presence of the corporate seal does not necessarily bind the corporation. If it was not affixed pursuant to the direction of a meeting

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<sup>20</sup>Garrow v. Brandon School District (1923) 3 W.W.R. 442.



convened according to statute, it has no effect. In Sparling v.

Spring Coulee School Trustees<sup>21</sup> a contract with a teacher bearing both the seal of the board and of the teacher was held to be void because it had not been adopted at a properly convened meeting of the board.

### Continuous and Distinct Identity

The corporation has continuous identity, independent of its members. Thus school board members may be elected, hold office and retire from office without affecting the identity of the board. Their acts, by which they contract liabilities or obligations binding on the corporation, bind their successors even though these are not expressly named.<sup>22</sup>

The corporation further is a distinct identity, the individual corporators being wholly different from the corporation itself. It is as much a legal person as are the members. Therefore, whoever contracts with the corporation must look to the corporation for satisfaction. He can recover from the members only if the creating statute so provides. A notice to an individual member who does not have authority to receive notices is not equivalent to a notice to the corporate body. Also where a legal action is maintained against the corporation and in its name, it cannot be maintained against the individual members. Although upon dissolution the corporation's powers disappear, its liabilities remain. These may be added to a new corporation formed in its place, disposed of

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<sup>21</sup>(1900) 4 Terr. L. R. 366.

<sup>22</sup>Giroux v. Corporation d'Ecoles Catholiques de Verdun (1955) Que. S. C. 207.



in a Court of Equity or otherwise as provided by law,<sup>23</sup> but the corpo-<sup>78</sup>  
ration cannot escape its responsibility for debt merely by dissolution.

The question of continuous succession was the issue in Porteous v. North Vancouver School Trustees.<sup>24</sup> A commissioner was appointed for the district of North Vancouver, under Sec. 476 of The Municipal Act, to replace the board of trustees. Under this Act he was given all powers and authority of the board whose powers were deemed to have ceased and its members retired from office. In an action brought against the board of trustees, the commissioner applied to have the summons set aside on the grounds that the defendant corporation had ceased to exist at the time of his appointment as commissioner. The Court held that he was not the successor in office of the trustees and granted the application. A subsequent amendment to The Municipal Act made such a commissioner the successor of the school board and the judge reversed his earlier judgment. The effect of the new legislation was to continue the legal existence of the corporation.

Similarly in the Alberta case of Royal Bank v. Acadia School Division<sup>25</sup> the bank was the holder of a debenture for \$6,358.33 issued by a rural school district which had become part of the Acadia School Division No. 8. Section 33 of The School Act<sup>26</sup> read as follows:

All liabilities of each district shall be assumed by the divisional board and such liabilities shall thereafter constitute a debt owing by the division as if the same had originally been

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<sup>23</sup>See The School Act (Alta.) 1957, ss. 43-45.

<sup>24</sup>49 B.C.R. 476, reversed on review (1935) 2 W.W.R. 280, 50 B.C.R. 78.

<sup>25</sup>(1943) 1 W.W.R. 256.

<sup>26</sup>R.S.A. 1941, c. 35.





contracted by it and shall be payable by the divisional board out of funds of the board and thereafter the constituent districts within the division shall be freed and discharged therefrom.

The Court, ruling in favor of the bank, held that this section made express provision for the board to pay the debt and expressly made it liable for the debt. The divisional board was the successor of the original school district board.

### III. Internal Regulation of the School Corporation

#### Election of Members<sup>27</sup>

Since the school board is a corporation it follows that the trustees are the members of the corporation. When a seat is vacant, the corporation may be compelled--the board is in fact compelled--to fill the vacancy so that the succession is maintained. However, the occupier of the seat must be regularly removed before it can be declared vacant and hence filled. Thus, in Chaplin v. Woodstock Public School Board<sup>28</sup> it was held that trustees who had violated The Public Schools Act by having certain contracts with the board of which they were members, had not vacated their seats until the other members of the board had declared them vacant. Said Street, J.:

The duty of declaring them vacant, if the charges are established, devolves upon the remaining individual members of the board who are not parties by the fact that the school corporation is a party defendant.<sup>29</sup>

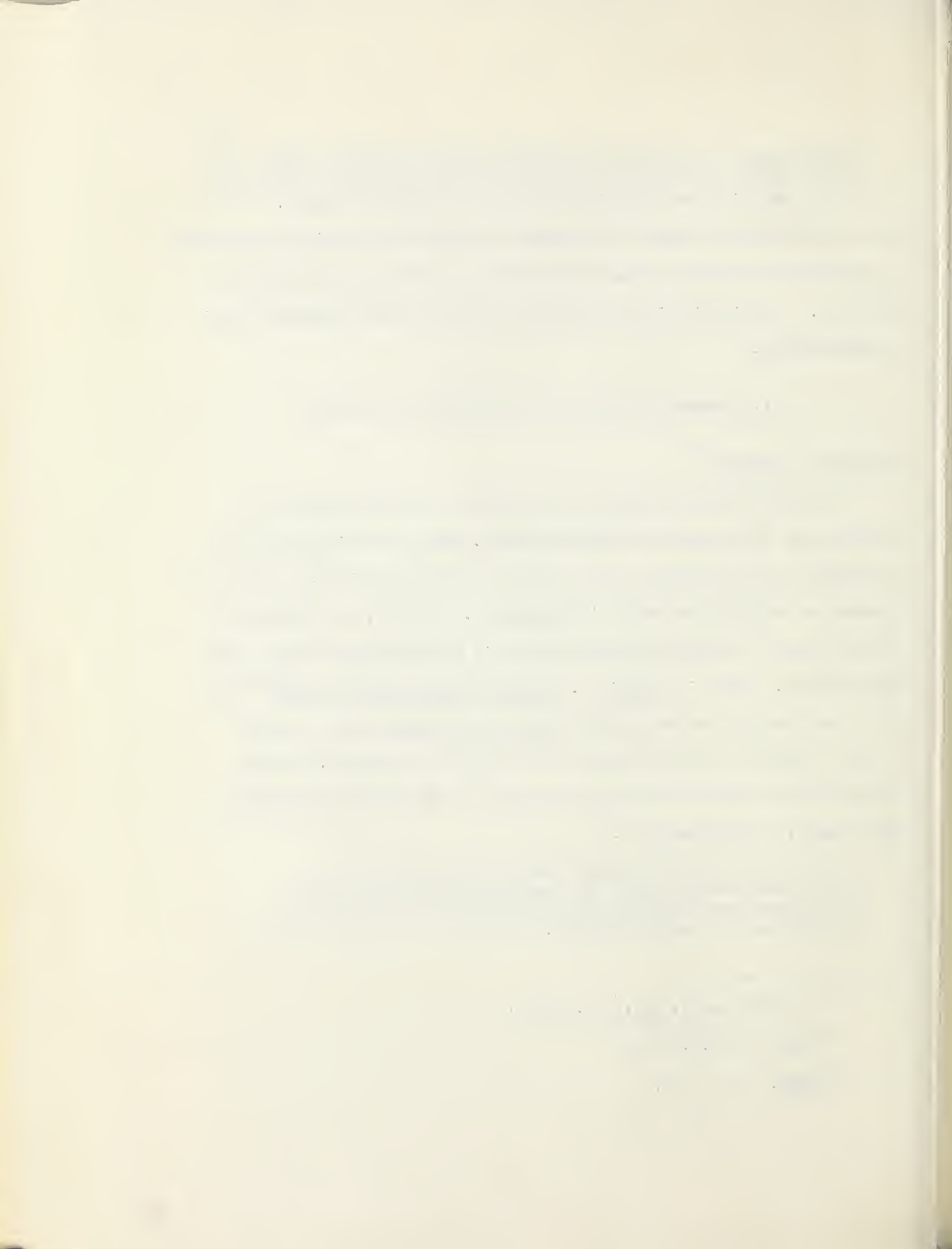
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<sup>27</sup>9 Halsbury, Op. Cit., pp. 33-34.

<sup>28</sup>(1889) 16 O.R. 728.

<sup>29</sup>Ibid., at p. 733.





A Manitoba Court<sup>30</sup> followed the same reasoning, but indicated that when such procedure was ineffective, quo warranto proceedings could be employed. In this case all but two of the members of the St. Boniface school board had received gifts purchased with school funds. The two innocent trustees called a meeting of the board and presented a resolution declaring all the other seats vacant and calling for a new election. The resolution was defeated. Since the innocent trustees had no statutory remedy, the Court permitted the use of the common law procedure of quo warranto to oust the trustees.

When a trustee is elected erroneously to fill an office thought to be vacant, the election is bad. However, a de facto school trustee, that is, one who is actually in office, is presumed rightly to hold office until the contrary is established by due course of law. Similarly, if a person is acting under two appointments, one legal and the other illegal, the Courts presume that he acts under the legal appointment. Thus in R. V. Johnston<sup>31</sup> the Court held that although defendant had been improperly elected almost two years earlier, the election should not be set aside in view not only of the delay in the application to the Court, but also of the many matters in which he had acted as the de facto trustee. The public interest would not be served by declaring the election invalid for this would throw doubt on the validity of his actions during the two year period.

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<sup>30</sup>R. V. Maycock (1924) 3 W.W.R. 540, (1924) 4 D.L.R. 1222.

<sup>31</sup>6 N.S.R. 214, (1923) 2 D.L.R. 278.



A New Brunswick Court<sup>32</sup> elaborated on the de facto doctrine.

Street, J., commented:

The de facto doctrine is a rule or principle of law which... imparts validity to the official acts of persons who, under color of right authority...exercise lawfully existing offices of whatever nature, in which the public or third persons are interested, where performance of such official acts is for the benefit of the public or third persons and not for their own personal advantage. The doctrine is grounded upon considerations of public policy and necessity and is designed to protect and shield from injury the community at large or private individuals who, innocently or through coercion submit to, acknowledge or evoke the authority assumed by...officers above mentioned.<sup>33</sup>

To reject it (the act of the trustee)...and...to hold the trustee disqualified after he had been serving as such for two years, would be to raise serious questions as to everything done by the board during that period in order to give effect to a petty technicality.<sup>34</sup>

Election or appointment to membership is, of course, controlled by the statutory constitution of the corporation. Thus, in an Alberta case<sup>35</sup> defendant was elected by a vote of 169 to 163 for his opponent. The opponent contested the election on the grounds that seven persons who had voted were not qualified to do so because they were not British subjects. The Court ruled that since their votes might have affected the election, it must be set aside. Similarly, nominations must be carried out in accordance with statute. If it requires nominating

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<sup>32</sup>Gunter v. Prince William School District Trustees 8 M.P.R. 113, (1934) 3 D.L.R. 439.

<sup>33</sup>Constantineau on the De Facto Doctrine, 1910, pp. 3-4, quoted in 3 D.L.R. 439 at p. 442.

<sup>34</sup>Perdue, J. in Youville School District v. Bellemere (1904) 14 Man. R. 511 at p. 522, quoted in 3 D.L.R. 439 at p. 443.

<sup>35</sup>R. v. Wright (1947) 1 W.W.R. 606.



electors to be resident ratepayers, a nomination by one who is not resident is unacceptable and the resulting election is bad.<sup>36</sup> If the appointment of a trustee is made by a municipal government, such appointment must be regular. In R. v. Nagel<sup>37</sup> an Ontario town council appointed a trustee to a high school board in January, 1894. In February it revoked this appointment and appointed another person in his place. The Court held that because tenure of a trustee in office is fixed by law, and is not at the council's pleasure, the appointment, once made, remains until a vacancy occurs in the normal course of events. Said Boyd, C.:

The body which appoints cannot, in such a case, arbitrarily change what has been done. The power to appoint was exercised and exhausted in the choice of (the first appointee) and he must remain in office during his term unless earlier legally disqualified and removed.<sup>38</sup>

#### Disqualification of Members

The constitution of the corporation, that is, the statute, stipulates when or under what circumstances members become disqualified from board membership. For example:

No trustee of any district or division shall in his own name or in the name of another, alone or jointly with another, enter into any contract in which he has a pecuniary interest with the board of which he is a member.<sup>39</sup>

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<sup>36</sup>R. v. Dinnin (1898) 3 Terr. L. R. 112.

<sup>37</sup>(1895) 26 O.R. 249.

<sup>38</sup>Ibid., at p. 251.

<sup>39</sup>The School Act, (Alta.) 1957, c. 297, s. 89(1).







Interpretation of this or similar provisions of statutes has often come before the Courts. An Ontario Court<sup>40</sup> ruled that a shareholder in a corporation which contracts with a school board does not thereby lose his seat. Osler, J., held that:

...What the section prohibits is the acts of the trustee himself--something for which he is directly responsible, or can control, or can individually do or refrain from doing or being a party to.

The corporation of which he is a shareholder, and which is a different entity from himself, can enter into a contract with a school corporation of which he is a member, without his assent, and so far as the latter corporation is concerned, against his will; and yet it is contended not only that the contract must be void, but that he must forfeit his seat for an act which he may have opposed by every means in his power.

We ought, perhaps, if the section is fairly capable of it, to place upon it a construction which will not work such an apparent injustice.<sup>41</sup>

Similarly, an Alberta Court held that a contract between a school board and a fraternal lodge of which some of the trustees were members, was not such as to disqualify the trustees.<sup>42</sup> However, trustees of another Alberta school district disqualified themselves as such by working on the erection of a school house and paying themselves for the work.<sup>43</sup> An Ontario medical practitioner acting in his professional

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<sup>40</sup>Lee v. Toronto Public School Board (1881) 32 U.C.C.P. 78.

<sup>41</sup>Ibid., at p. 87.

<sup>42</sup>Re School Ordinance (1914) 5 W.W.R. 1268.

<sup>43</sup>Muirhead v. Bullhead Butte School District (1911) 1 W.W.R. 253, 4 Alta. L.R. 12.



capacity under engagement by the board of which he was a member, to examine pupils attending school, was also disqualified and his seat declared vacant.<sup>44</sup>

A trustee who declines to act, whether he does so immediately following his election, or after he takes the oath of office and acts for a time before his subsequent refusal to carry out his duties, was held to have disqualified himself in New Brunswick.<sup>45</sup>

Quebec Courts have held that the mere non-payment of taxes by the trustee during his term of office does not disqualify him.<sup>46</sup> If he was qualified in this respect at the time of his election, he does not become ineligible just because he does not pay taxes when they fall due. Nor is a person disqualified from election as a school commissioner if he acquired lands on which taxes were unpaid at the time of his election.<sup>47</sup>

#### Admission to Office

A person elected to the corporation has a right to be admitted to the corporation. On the other hand, he must assume office and take the prescribed oath or declaration of office within a reasonable time, or he will be deemed to have waived election. The title to office is not

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<sup>44</sup>R. v. Standish (1884) 6 O.R. 408.

<sup>45</sup>Ex Parte Kilby and McLane (1873) 14 N.B.R. 219.

<sup>46</sup>Tremblay v. Godreau (1945) Que. S.C. 219.

<sup>47</sup>Sénécal v. Gagnon (1957) Que. S.C. 260.



complete until the officer had complied with all the required formalities.<sup>48</sup> These provisions are however, tempered by the Courts in the light of the previous statement on the de facto doctrine. The concern of the Courts is that public business will go on free from disturbances arising out of petty technicalities. If the language of the statute makes clear that as long as the trustee acts legitimately in the discharge of his duties and responsibilities, the lack of a declaration of office may not be considered serious.<sup>49</sup>

An Ontario case illustrates that trustees do not assume office until they have completed the necessary formalities.<sup>50</sup> Trustees were elected, but before they made their declarations of office, objections were raised to their election on the grounds that there had been improper nominations. Rather than oppose the objections in possible litigation, the trustees agreed to submit to a new election. They canvassed for votes during the next three weeks, at the end of which time, proceedings to contest their election were dropped. They then reversed their tactics and declared that they had been properly elected. However, a second election was held and they were defeated. In their proceedings to have the second election set aside, the Court ruled that by their acquiescence in the new election they had agreed that their own election had been irregular, and since they had not made their declarations of office,

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<sup>48</sup>For example, see The School Act, (Alta.) 1957, ss. 148-49 and The Public Schools Act, (B.C.) 1958, s. 86.

<sup>49</sup>Gunter v. Prince William School District Trustees, Loc. Cit.

<sup>50</sup>Foster et al. v. Stokes (1882) 2 O.R. 590.





they were not, in fact, trustees.

### Removal of Members of a Corporation<sup>51</sup>

Members of the corporation may be removed for cause. However, the power to do so is strictly interpreted. If the constitution provides for removal on a vote of the majority of the corporation, then the majority means the majority of the whole corporation, including the persons to be removed. As the case of R. v. Maycock<sup>52</sup> shows, when a person duly elected to office, has by some act or circumstance forfeited his right to office, the mere act or circumstance does not operate as vacation of the office. The holder must be removed by the corporation or other competent authority. When a person holds an office at the will of the corporation, as for example the chairman of the school board, he may be removed from it by the will of the corporation, though not from membership in the corporation.<sup>53</sup>

Causes for the removal of members may be among the following: his commission of an indictable criminal offense, his inability to perform the duties of office, his negligence in the performance of duties, bribery or breach of trust. Generally speaking, removal of a member of the corporation is by quo warranto proceedings when there are no other statutory procedures. A person removed from membership may be restored

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<sup>51</sup>9 Halsbury, Op. Cit., pp. 36-40.

<sup>52</sup>See Supra p. 80.

<sup>53</sup>The School Act (Alta.) 1957, C. 297, s. 161.





to it either by reelection or by mandamus in case of unjust removal.

However, if he is so restored, he cannot proceed against the members who removed him by a corporate act.

#### IV. Corporate By-Laws<sup>54</sup>

##### Definition of a By-Law

All regulations made by a corporation and intended to bind not only itself and its officers and servants, but members of the public who come within the sphere of their operation, may properly be called by-laws, whether they are valid or invalid in point of law; but the term may also apply to regulations binding only on the corporation, its officers and servants.<sup>55</sup>

##### Power to Make By-Laws

Every corporation has the power to make by-laws relative to the purposes for which it is constituted. Unless such by-laws are made under statutory authority, however, or unless it can be shown that they were brought to the person's knowledge and he agreed to be bound by them, they bind only the members of the corporation. The power to make by-laws is incidental to the corporation, and is to be exercised by the corporation at large, rather than by a select body or standing committee, though this may be provided for by statute.

This fact was emphasized by Mr. Justice Taschereau of the Supreme Court of Canada when he said:

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<sup>54</sup>9 Halsbury, Op. Cit., pp. 41-46.

<sup>55</sup>Ibid., p. 41.



Members of a corporation aggregate cannot separately and individually give their consent in such a manner as to oblige themselves as a collective body, for in such a case it is not the body that acts. It is only at a lawful meeting of the corporate body that the corporation can act or do anything.<sup>56</sup>

By-laws may be made at any time after incorporation by following the formalities prescribed. By the same token, they may be altered or repealed at any time, provided that the proper procedures are observed. Because the corporation is a creature of statute, its by-laws may be altered, confirmed or repealed by the legislature.

#### Validity of By-Laws

Where the statute prescribes the form and manner of making by-laws, the corporation must follow that procedure to make valid by-laws. If confirmation by an external authority such as the ratepayers, an agency of the provincial government or of the legislature itself is required, such confirmation must be obtained. Otherwise the by-law is invalid and cannot be enforced at law. This is the case when a municipality makes an agreement with another corporation regarding fixed assessments or tax exemption.<sup>57</sup> A by-law is always presumed to have been made with the knowledge and consent of every member of the corporation. Therefore, no member can plead ignorance of a corporation's by-laws, nor allege that the corporation has no power to make or enforce a by-law which was in effect when he became a member.

A by-law must not be opposed to the constitution of the corporation.

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<sup>56</sup>Picton County School Trustees v. Cameron (1879) 2 S.C.R. 690, at p. 713.

<sup>57</sup>C.P.R. v. Winnipeg (1900) 30 S.C.R. 558 reversing 12 Man. R. 581.



Because it is legally inferior to the constitution, a by-law cannot be used to remedy a defect in the constitution, nor to increase the powers which it grants. A by-law must be reasonable in relation to the framers, the locality and the persons to whom it is to apply. It is a judicial rule that by-laws of public corporations entrusted by the legislature with delegated authority ought to be interpreted benevolently and supported if possible.

To be valid, a by-law must not be repugnant to the law in general, but it is not repugnant merely because it supplements the law, or deals with something not covered in it. However, it cannot alter the law by making lawful what is unlawful, nor unlawful what is lawful. A by-law repugnant to the law or the corporation's constitution is void.

A by-law must be specific and its effects must be certain. It must include enough information to make absolutely clear the duties of those who are to be affected by it. Thus a by-law purporting to alter the boundaries of an Ontario school section was set aside because it lacked specificity.<sup>58</sup> The by-law simply stated that alterations would be as shown on the appended map, but did not mention the specific lots that were to be included. The Court held that because it did not properly define the limits of the division, it was defective and could not be upheld.

If a by-law is open to two constructions, the one valid and the other invalid, the Courts hold that the valid construction prevails. A by-law which is void in part is void in total unless the void part can

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<sup>58</sup>Hoake v. Markham (1859) 17 U.C.Q.B. 562.





be separated from the good and the good part enforced independently.

To enforce its by-laws the corporation may apply sanctions against the person breaching them. Sanctions may be imposed only if the offense is within the jurisdiction of the corporation and if the sanction is in proportion to the offense. Power to enforce by-laws is usually controlled by statute. The statute may permit distress of goods or chattels, or enforcement by legal action, but such measures may be taken only after proper demand to comply with the by-law and refusal to do so. In any event the provisions of the statute must be strictly followed. A Nova Scotia case is significant in this connection.<sup>59</sup>

The school trustees had assigned the collection of taxes without properly fulfilling the statutory requirements. The collector, in turn, issued a distress warrant against plaintiff before submitting his affidavit, as required by law, that the plaintiff had defaulted. Because he had not followed the proper procedure, the Court found against the collector. Said Mr. Justice Ritchie:

This is a taxing statute. Under it private rights and property are affected. Such a statute receives strict construction and full effect is given to imperative language.

Evidence of the existence of by-laws is provided by the books of the corporation. When there is proof of very old, though not necessarily immemorial, usage in relation to internal government of a corporation, the Courts will presume a by-law or other legal origin of such usage. However, ancient usage is not valid against the constitution of the

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<sup>59</sup>Sterling v. Cumberland School Trustees (1915) 49 N.S.R. 125.



corporation, nor against a valid by-law. An Ontario case illustrates the effect of ancient usage. In Burford School Trustees v. Burford<sup>60</sup> the question was raised as to whether lands were being properly assessed and their taxes assigned to the proper school sections. The only evidence regarding proper boundaries was an old map simply designated as "School Section Map, Township B." The map was without signature, seal or date, but was produced from proper custody and was obviously very old. Since there was no other map, the Court held that it must be presumed to be a true map and admissible as evidence of the original division of the township into school sections.

#### V. Meetings of the Corporation

##### Necessity of Notice of Meetings

A corporation can do corporate acts only at properly constituted meetings, at which a quorum is present, unless the constitution provides otherwise. Such a meeting must be convened by the proper authority and upon proper notice or other formality prescribed by the creating statute. The purpose of these requirements is to give every member the opportunity to attend, for every act or proceeding of the corporation, to be valid, must be adopted at a regular or special meeting of the corporation. The legal requirements for binding corporate acts are not satisfied by the board members individually consenting to the act or proceeding.<sup>61</sup>

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<sup>60</sup>(1889) 18 O.R. 546.

<sup>61</sup>See Waterman-Waterbury Manufacturing Co. v. South Arcola School District (1928) 3 W.W.R. 690, 23 Sask. L.R. 227, (1927) 2 D.L.R. 214, p.279, infra.



Notice of meeting is not necessary if the meeting date is fixed by the statute, for it is held that every member knows of the meeting. For meetings on any other day, or when no specific day is mentioned in the statute, it is essential that all who are entitled to attend are notified of the date and the business to be transacted. If a member who could have been notified is not summoned, the meeting is not properly convened, even though the oversight was accidental. However, a member who is out of reach need not be notified. A meeting called without notice may be made valid, and valid business may be transacted, if all members are present and all consent formally to waive notice of the meeting.

Notice must be given in the proper way to be effective. When there is a usual procedure, or one laid down by statute, it cannot be ignored. Every notice must be given in a reasonable manner, and at a reasonable time before the meeting. The notice must state definitely that the meeting will be held and must make clear what business is to be transacted. No other business may be introduced at the meeting unless the whole body of the corporation is present and consents unanimously.

The effect of bad notice is illustrated in Greenlees v. Picton Public School Board.<sup>62</sup> In this Ontario case the board called a special meeting ostensibly to conduct regular business, and six of the eight members were in attendance. At the meeting the question of the teacher's contract came under consideration. On a close vote the trustees instructed the secretary to give the teacher notice of termination of contract. In the resulting litigation the Court held the termination to be invalid.

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<sup>62</sup>(1901) 2 O.L.R. 387.





The notice of meeting had not stated this as the purpose of the meeting. Had it done so, there would possibly have been full attendance with a different outcome.

On the other hand, when the statute does not require the whole board to meet to make a contract of employment with a teacher, a formal meeting is not necessary and neither is notice required. In a New Brunswick case<sup>63</sup> a teacher was employed by two trustees who met informally with the third. The third refused to be a party to the agreement, suggesting that action be postponed until after the annual ratepayer's meeting. However, the other two proceeded anyway. At the annual meeting one of them was defeated. The new member and the previous dissenter, advertized for and engaged another teacher. The first teacher was refused opportunity to teach and brought action for wrongful dismissal. The board maintained that there was no contract with her because there had been no formal board meeting which had engaged her.

Regulation 2 of the Manual of School Law, under which the action proceeded, read as follows:

Each teacher and licensed assistant before entering on duty in any district shall make a written agreement with the board of school trustees (each party retaining a duly executed copy of the same) in accordance with the following form. The full board of trustees should be consulted before entering into or giving notice of termination of contract with the teacher, but in case of a disagreement or the absence of any of the trustees from the meeting of the board regularly called, a majority of the board may engage a teacher or give notice of dismissal or transact other business of the district.

The Court held that there was a valid and binding contract with plaintiff. It was not necessary to have all the trustees together,

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<sup>63</sup>McDonald v. Eldon School Trustees (1929) 1 M.P.R. 253.



but the consultation might take place at any time as long as all the members were cognizant of the proposed contract. The Court distinguished this case from others where formal meetings had been held essential, on the basis of a difference in statutory requirements.

### The Necessity of a Quorum

The acts of a public corporation are really the acts of the majority of the members corporately assembled. In the absence of special statutory provisions to the contrary, the major part of the corporation must be present, and of that part, the majority must favor the resolution contemplated before it can be given effect. If the creating statute requires the head of the corporation to be present at a meeting, then the body cannot conduct business in his absence, except to complete business initiated while he was present. In other words, the head becomes part of the necessary quorum. If the statute requires a particular quorum, any action taken by the corporation without the quorum is invalid as against strangers.

### Procedure at Meetings

As has been indicated above, if a corporation is entrusted with a public duty, and if it has been duly assembled, a corporate action may be taken by the majority at the meeting. In all acts of the corporation aggregate, the decision of the majority binds the minority and may be enforced against them, except in cases of fraud, or acts ultra vires the corporation. In that case the minority cannot be bound, and they can obtain relief by legal action. Where the majority refuse to discharge a duty imposed on the corporation by law, the individuals may be punished by legal process, but the refusal does not enable the minority to perform



validly the duty in question.

Although they must abide by the will of the majority, the minority have a right to be heard, and the majority must give them opportunity to express their views. At the same time, they must not obstruct the majority unreasonably. However, where the matter is one which the majority have a right to do, the minority have no right of action against them even if they disapprove.

A judicial ruling on the right of the majority is given in Howard v. Toronto Board of Education.<sup>64</sup> This was an action by a ratepayer in his own and others' behalf, applying to the Court to restrain the board from appointing a high school teacher to the principalship of a Toronto public school. By The Boards of Education Act, representatives of the separate schools were not allowed to vote on public school matters. Hence the board's agendas were in two parts. Part I dealt with high school matters and Part II with elementary school matters. Plaintiff argued that the present appointment should have been considered in Part I instead of in Part II as had been done, since it involved the transfer of a high school teacher.

Mr. Justice Kelly held that even had there been an irregularity in the procedure of the meeting in question, the minutes of that meeting had been subsequently adopted by the whole board, with separate school representatives present, and the full board had also ratified the appointment. The Court ruled that the minority have no right of action against the majority in respect of proceedings of which they do not approve when

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64(1920) 18 O.W.N. 350.





the act is one which the majority is entitled to do. In this case the majority was not only entitled to act but was discharging a duty imposed by statute.

The presiding officer must preserve order, see that proceedings are properly conducted and get the feeling of the meeting on all questions before it. He cannot stop or dissolve the meeting at his own will, and if he declines to act, the other members can resolve to proceed with the business and choose their own chairman. If a corporate decision results from an incorrect ruling by the chairman, the decision may be set aside by the Courts. All resolutions placed before the meeting must be in unambiguous terms, or the chairman may refuse to put them to a vote. Pertinent amendments may be moved by any corporator and the presiding officer is bound to accept them and put them before the meeting.

#### Adjourned Meetings

A corporation has the power to adjourn a meeting to a specific date to complete unfinished business. At common law the adjourned meeting is considered to be part of the original meeting. Therefore, no notice is required, unless new business is to be considered, in which case the proper notice is necessary. A meeting simply adjourned to the call of the chairman, without a specific date mentioned, is not considered to be an adjourned meeting and therefore the same formalities apply to it as apply to any special meeting not held on the regular meeting day.

As an example, in Re Lacombe School District and Stewart<sup>65</sup> the

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<sup>65</sup>(1942) 3 W.W.R. 269 (Alta.).



board passed a resolution to adjourn to the call of the chairman. It met a few weeks later in response to the chairman's call but not on any other form of notice. All the members were present, and the board passed a resolution dismissing the teacher. In the subsequent legal action, the meeting was held invalid because it had not been adjourned to a specific date, and therefore the notice of dismissal was void.

## VI. Powers and Duties of the Corporation<sup>66</sup>

### General Powers

In general, statutory corporations have only those powers and rights that are authorized directly or indirectly by the statutes creating them. Their powers do not extend beyond those expressly stated, and those which are necessarily and properly required for carrying out the duties of the corporation or which may fairly be regarded as incidental for performing those functions which the legislature has authorized. What is not expressly authorized or implied by statute is taken to be prohibited. Statutes which confer a special authority affecting the property and rights of individuals are strictly construed against the body to which authority is given and in favor of the persons affected. But an authority to perform specific functions includes all acts reasonably necessary to accomplish them. At the same time, an act which may do injury to others cannot be justified as necessary merely because it makes the work easier, more convenient or more economical. Consideration must also be given to the effects it will have on the accommodation and convenience of those who are affected by the act. Thus it is the

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<sup>66</sup><sub>9</sub> Halsbury, Op. Cit., pp. 59-63.



duty of persons exercising statutory powers to remain strictly within those powers. If they exceed their powers, they are to that extent deprived of the protection afforded by the statute and become subject to the remedies provided by statute and the common law. Injunctions may be granted to restrain acts in excess of statutory powers, and persons injured by such acts may be entitled to recover damages.

### Mandatory and Discretionary Powers<sup>67</sup>

Some powers of the corporation are mandatory and must be exercised. Others are discretionary and may be exercised or not as the corporation wishes. Where public bodies have discretion in exercising their statutory powers, the Courts will not interfere unless: they act outside those powers; they have committed an irregularity resulting in serious prejudice to others; they have been manifestly mistaken, even in good faith; they have voluntarily perpetrated an injustice.<sup>68</sup>

The distinction between mandatory and discretionary powers is important in determining whether an action will lie for damages resulting from the exercise of powers; or where powers have not been exercised, for injury which might have been prevented had they been exercised.<sup>69</sup> However, all statutory powers, whether mandatory or discretionary must be exercised reasonably, without negligence and for the purposes for which

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<sup>67</sup>30 Halsbury, Op. Cit., pp. 687-89.

<sup>68</sup>Kelly v. Commissaires d'Ecoles de Ste. Etienne de Luzon (1953) Que. S.C. 431.

<sup>69</sup>See Chapter VII, infra, pp.237-240 .





they were granted. In general, the Courts are mainly concerned with seeing that the objects of the statute are being achieved, and therefore tend to construe powers exercised for public purposes more liberally than those exercised for private purposes. At all events, permissive powers must not be exercised oppressively. Due care must be taken to prevent unnecessary injury, but it is not necessary to provide for every possible contingency.

Interference with Individual Rights in the Exercise of Powers.<sup>70</sup>

The exercise of statutory powers, whether mandatory or discretionary, may result in interference with the rights of individuals. Where the legislature directs that a thing shall at all events be done, or grants powers that must be exercised even though it leaves some discretion in the manner of exercise, no action lies at common law for nuisance or damage which is the inevitable result of carrying out such statutory powers. In the absence of negligence, the body exercising the statutory powers cannot be held liable merely because it might, by acting in a different way, have minimized the injury. However, because interference with personal and property rights may be involved, the onus of proof of authority to interfere rests on those who claim the right to do the act. They must show clearly that the statute does in fact take away or circumscribe private rights. Similarly, the burden of proving inevitability of nuisance or damage rests on those who seek to escape liability.

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<sup>70</sup>30 Halsbury, Op. Cit., pp. 690-92.



Power of the Corporation to Contract<sup>71</sup>

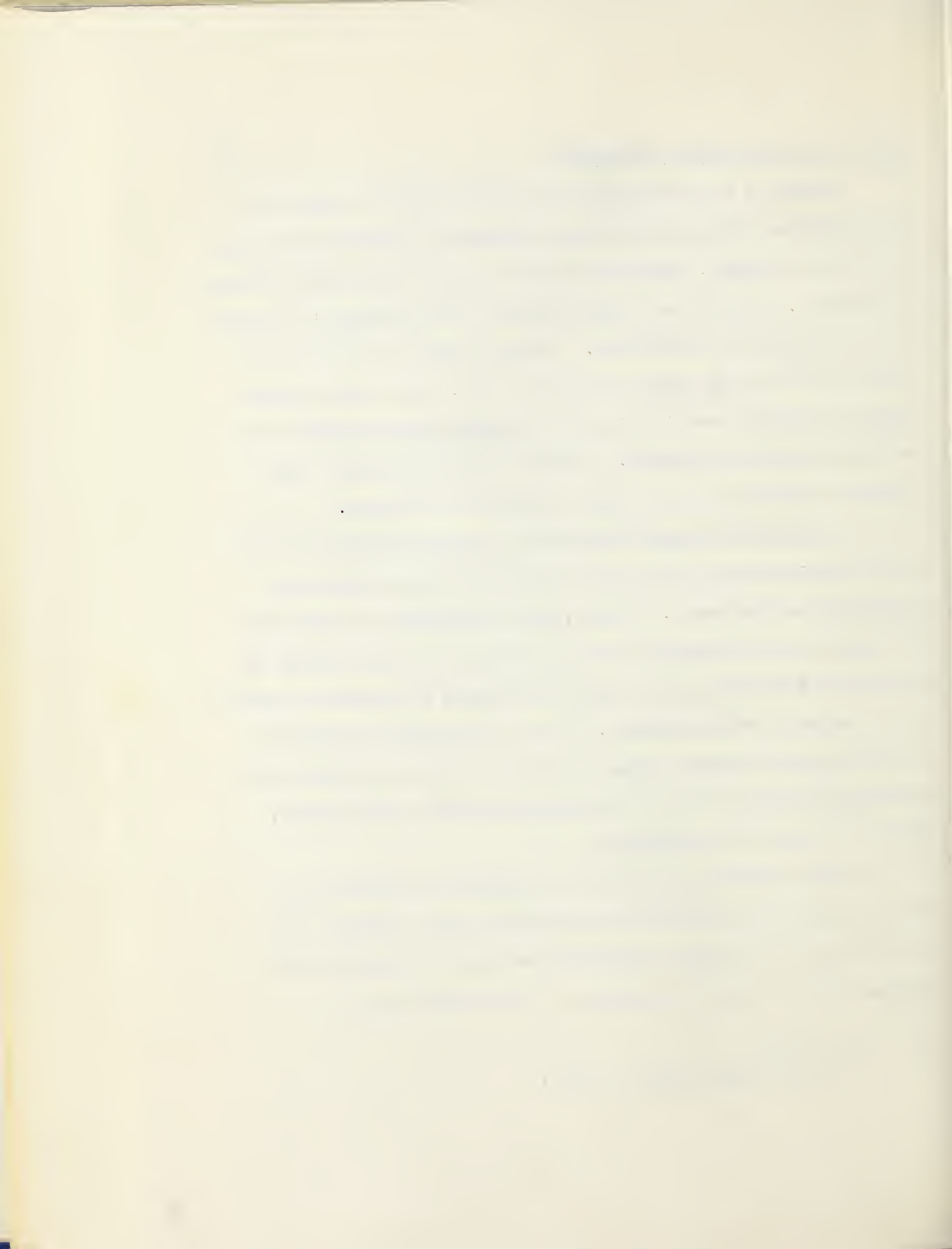
Because it is an intangible body separate from its members, the corporation can perform its duties and exercise its powers only by means of the acts of humans. Therefore it has the power to bind itself by means of contracts. However, the subject matter of the corporation's contracts is controlled by its constitution. Contracts beyond the scope of the constitution are ultra vires and therefore void. Even a deed executed under the corporate seal is void if it is ultra vires by statute or by reasonable inference therefrom. Nor can a corporation grant a valid license to someone else to do what is beyond its own powers.

A corporation aggregate created for a specific purpose by an Act of the legislature may apply to the legislature for an extension or modification of its powers. However, when a corporation is restricted by statute as to its dealings with its property, or in the exercise of its powers, the restriction is absolute and cannot be modified or waived by the members of the corporation. Thus, a corporation authorized to raise money for a specific purpose, such as for school construction or maintenance, cannot, even with the unanimous consent of its members, apply the money for other purposes.

In this respect, money raised by a municipal corporation on a school requisition or on debentures issued for school purposes, must be turned over to the school corporation and may not be used for the purposes of the municipal corporation. In the Ontario case of

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<sup>71</sup>9 Halsbury, Op. Cit., pp. 63-71.



Clarkson v. Alliston<sup>72</sup> a municipal council was compelled to pay over the unexpended portion of money which had been raised by sale of debentures for new school construction. Similarly, an Alberta Court<sup>73</sup> held that moneys accumulated by a rural municipality by excessive levies to fill school requisitions, must be used for school purposes.

A corporation entrusted by the legislature with certain expressed or implied powers and duties for public purposes cannot divest itself of those powers and duties. It cannot enter into any contract or take any action incompatible with the due exercise of its powers or the discharge of its duties. Thus, in McLeod v. Salmon Arm School Trustees<sup>74</sup> a school board was held not to have the power to make a special agreement with a municipal corporation in contravention of a binding arbitration award in a dispute over its requisition. Nor was it permitted to close its schools to children under its jurisdiction because, as it maintained, it had insufficient funds to provide a full year's schooling.

General words relating to powers in the constitution of the corporation are construed as ancillary to the main objectives for which the corporation was formed. Thus the dominant purpose of the school corporation being the education of children,<sup>75</sup> other powers are construed in terms of this purpose. Special powers assigned to particular members or officers of the corporation are construed in the same way. A body

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<sup>72</sup>8 C.B.R. 587, affirmed 10 C.B.R. 65, 62 O.L.R. 149, (1928) 2 D.L.R. 715.

<sup>73</sup>Re Spruce Grove Rural Municipality and Huron School District and Splan School District (1919) 1 W.W.R. 4, 44 D.L.R. 153.

<sup>74</sup>(1952) 2 D.L.R. 562, 4 W.W.R. 385, see pp.195-201 infra.

<sup>75</sup>McLeod v. Salmon Arm School Trustees, Loc. Cit.





corporate, being separate from its individual members, acts only by means of its agents. Subject to the provisions of the statutes, the law of agency applies to regulate the authority and liability of both the corporation and its agents.

When a corporation is constituted by Act of the legislature, all other persons are presumed to know the nature and extent of its powers. Although a person dealing with a corporation or its agents in good faith is not bound to see that the necessary regulations are being carried out, it is prudent for him to do so, especially where the regulations are statutory. He should determine whether or not the statutory requirements are being met, for he may be without relief if the corporation exceeds its authority or attempts to modify statutory provisions.

#### Liability of the Corporation in Contract<sup>76</sup>

The corporation is capable of binding itself only in those types of contracts permitted by its statutory constitution. If the constitution requires observance of certain formalities in making particular contracts, these formalities must be strictly carried out. Otherwise the corporation cannot be held liable, nor can it enforce the contract against another party.<sup>77</sup>

Ordinarily, to be enforceable by or against the corporation, contracts must be under seal, for the corporation is not bound by the

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<sup>76</sup>9 Halsbury, Op. Cit., pp. 81-86.

<sup>77</sup>See Waterman-Waterbury Manufacturing Co. v. Slavanka School District, pp. 279-282, infra.



mere signature of the members, nor by a mere resolution of the corporate assembly. The seal when affixed, is equivalent to a signature by a natural person. However, the corporation may ratify an unsealed contract by sealing it at any time before it is broken or repudiated by the other party. Where the contract is not ratified, a corporation may be bound by its own acquiescence in the terms of the contract. By express terms of the statute, the corporation may do some things without its seal. For example, bills of exchange, cheques, etc. may be issued when these are within the powers of the corporation, without sealing. Also in trivial matters of everyday occurrence or in matters of urgent necessity, the seal may not be required. The statute may also provide that contracts need not be under seal, but merely that they be entered into by the corporate act of a duly assembled meeting.

#### Borrowing Powers of the Corporation<sup>78</sup>

Although trading corporations have implied power to borrow, this is not so for public corporations. Their borrowing powers are restricted by their constitutions. If the statute restricts borrowing to a stipulated sum, then borrowing more than that sum is ultra vires. Hence, persons dealing with a corporation having limited borrowing powers, must inquire whether the proposed borrowing is within the powers of the corporation. Ultra vires borrowing does not increase the corporation's indebtedness, for such loans cannot be recovered against it. However, in some circumstances the lender may have a remedy. If the proceeds of the amount

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<sup>78</sup>9 Halsbury, Op. Cit., pp. 68-69.



borrowed in excess of statutory powers are applied by the corporation in payment of its legitimate creditors, the liabilities of the corporation are not increased. Only the creditors are changed, and the lender as against the corporation is entitled to take the place of the former creditors to the extent that his money was so applied.<sup>79</sup>

#### Ownership of Property by the Corporation<sup>80</sup>

Individual corporators are not the owners of the corporation's property and therefore are not free to do with it as they please. Rather, they are public trustees and are bound by statutory provisions. In Re Almonte Board of Education and Almonte<sup>81</sup> it was held that the board had no power to lease some of its property for revenue purposes, though it could dispose of property by "sale or otherwise." Similarly, in Niagara Public School Board v. Queenston Women's Institute<sup>82</sup> it was held that a lease which is not authorized by the legislation from which the board derives its powers is ultra vires and void. Further, where such a lease is cancelled, the board must, on the principles of equity, repay the consideration for the lease.

The Nova Scotia case of Picton School Trustees v. Cameron<sup>83</sup> helps to clarify what trustees may or may not do with school property. In 1874,

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<sup>79</sup>Quinlan v. St. John School Trustees, p. 32, supra.

<sup>80</sup>9 Halsbury, Op. Cit., pp. 72-76.

<sup>81</sup>64 O.L.R. 505, (1930) 1 D.L.R. 368.

<sup>82</sup>59 O.L.R. 213, (1926) 4 D.L.R. 13.

<sup>83</sup>(1879) 2 S.C.R. 690.





in opposition to community opinion, a board of school trustees resolved to move the school house to a new site. They attempted to do so at night with the result that they succeeded in moving it only about the length of the building, and in doing considerable damage to the foundation of the school house. The Commissioner of Schools dismissed the trustees for their action and appointed three others. In an action for trespass brought by the new trustees, the deposed board members maintained that they were lawful trustees at the time of their act. They could not be sued, for the school corporation could not, in effect, bring suit against itself. Nor could they be sued personally for carrying out the work of the corporation, which even though mistaken, was done in good faith. The Court dismissed the action and it was appealed to the Supreme Court of Canada.

The Supreme Court of Canada ruled that the trial findings were based on a misapprehension. The lower Court had dealt with the case as though the property was vested in the trustees personally and not as a corporate body, and as though the action were being brought by individuals for personal injury rather than by a corporation for wrong done to the title and possession of the corporation. By statute the trustees were required to take possession and hold as a corporation all the school property of the section. Therefore, title is in the corporation and not in its members, for though the trustees may change, the corporation continues and title and possession continues in the corporation. The members are not legally the corporate body. They are the elements which form the artificial body, but they are distinct from the corporate body itself, which is endowed with legal powers.



The acts of the trustees are, no doubt the acts of the corporation, but only when within the scope of authority conferred on them by the law establishing the corporation. Their acts are only the acts of the corporation so far as they have such authority to act, by virtue of the powers conferred upon them.<sup>84</sup>

The legislature grants only limited powers to trustees. If trustees deal with property confided in them, not only in ways not sanctioned by law, but contrary to the law, as distinguished from error, mistake, misapprehension or neglect, they cease to act as trustees. Their act then is not a corporate act. They become wrongdoers and as such are liable to be sued by the corporation, as any other wrongdoers or trespassers. In this case defendants acted without the authority of law. Because they acted outside their powers, abusing the authority given by statute, they became trespassers and therefore were personally liable to suit by the corporation.

#### Statutory Powers and Duties of School Boards

As is implied and expressed throughout this chapter, the powers and duties of school boards are explicitly stipulated by provincial school statutes. As a statutory public corporation the board may not act outside the limits of these provisions. However, it is to be noted that while powers and duties are stated, the manner of their exercise is not always specifically expressed. Thus a certain amount of discretion is extended, and powers to carry out some duties are implied. For example, an Ontario school board which by statute was permitted to provide transportation for pupils to a rural school, was held to be entitled to build a stable to

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<sup>84</sup>Ibid., at p. 700.



accommodate the horses ridden and driven to school by pupils. The Court held that the erection of the stable was within the board's authority even though the transportation was furnished by the parents of the pupils.<sup>85</sup>

#### VII. Liability of the Corporation in Tort<sup>86</sup>

The corporation may be liable for any tort provided that: it is a tort in which action would lie against an individual; the person by whom it was committed was acting within the scope of his authority and in the course of his employment as a servant or agent of the corporation; the act complained of is not one which the corporation could not be authorized by its constitution to commit in any circumstances. Thus action may lie against the corporation for torts such as trespass, negligence, nuisance, malicious prosecution or libel.

To make the corporation liable for such acts it must be established that a relationship of principal and agent, or master and servant exists between the corporation and the person who commits the tort in question. Express authority to commit the act need not be proven; it is enough to show that there was implied authority, and this may be inferred from the nature of the agent's or servant's employment. If the wrongful act was done without express authority from the corporation, such authority cannot be implied if the act falls outside the statutory powers of the corporation, and then the corporation is not liable.

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<sup>85</sup>Re Coldstream Continuation School (1932) 41 O.W.N. 11.

<sup>86</sup>9 Halsbury Op. Cit., pp. 87-90.





No legal action lies at common law for damages caused by the proper exercise of statutory authority or the discharge of statutory functions. However, the corporation exercising its powers must use due diligence to prevent damage to others. The terms and construction of the statute determine whether or not the corporation is civilly liable for a breach of statutory duty.

Non-Feasance and Misfeasance<sup>87</sup>

School corporations are not obligated to exercise discretionary powers and there is no liability for not doing so. However, if they do exercise discretionary powers, they are bound to do so strictly in accordance with the terms of the statute. If injury is sustained by someone as a result of their not exercising discretionary powers, and if the damage might have been prevented had the powers been exercised, no liability attaches. But when the authority decides to execute a permissive power, and does so imperfectly, liability may attach if injury is caused. There is, however, no liability for damages which would have occurred anyway. If a statute imposes a duty to exercise a power, any person or any member of a class of persons--e.g. ratepayers--for whose benefit the duty is imposed, may maintain an action for injury arising out of failure to fulfil the duty. On the other hand, if there is no absolute duty, but merely the duty to exercise reasonable care and diligence, then negligence and misfeasance must be proved against the public body.

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<sup>87</sup>30 Halsbury, Op. Cit., pp. 697-98.



Vicarious Responsibility of Public Authorities<sup>88</sup>

It has been stated that the powers of a public corporation can be exercised only through servants, agents or contractors. Therefore, public authorities exercising statutory powers are, for all intents and purposes, responsible for the acts or omissions of their servants and agents, though in some few instances this liability may extend only to providing competent and professionally skilled persons. Thus the school board is responsible for injury sustained through negligent execution of statutory duties by a servant or contractor. It is not, however, liable for the negligence of a person to whom permissive powers are delegated if that person is an independent contractor. A public authority delegating the duties or powers it has to perform to its officers, is responsible for their wrongful acts provided the acts fall within the scope of their employment.

Liability for Negligence in Exercising Powers<sup>89</sup>

Authorities exercising statutory powers or performing statutory duties have imposed on them the further duty of using reasonable care and diligence to prevent their operations from causing injury to others. In this respect they have the same duties and their funds are rendered subject to the same liabilities as the law imposes on private individuals doing the same things. Where there is negligence or want of proper precaution, the mere fact that the act was done under statutory

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<sup>88</sup>Ibid., pp. 699-701.

<sup>89</sup>Ibid., pp. 695-97.



authority is not an adequate defense for the person committing the act. This is so even if the act is performed in the public interest and not for private gain. The only exception is that the statute may specifically exclude the right of action for negligence, and in that event, the burden of proof that the statute takes away the common law right rests upon those alleging it.

The care to be exercised by persons wielding statutory powers must be reasonable in the circumstances, giving regard not only to the interests of those exercising the powers but also to those suffering or threatened with injury. It is negligence to carry out work resulting in damage unless it can be shown that there was no other way to do the work. If work can be done in either of two ways, the one harmful and the other innocuous, then it is negligence to do it in the harmful way.

If by reasonable exercise of powers, given by statute or by common law, damage could be prevented, it is negligent not to do so. However, persons exercising discretionary powers under statute are not liable for damage which would have resulted even if the powers had not been exercised, although the damage might have been prevented by a further or more effectual exercise of the powers. When the legislature authorizes not only the doing of an act, but specifies the way in which it is to be done, the authority following statutory direction cannot be found guilty of negligence.

#### VIII. Legal Proceedings by and Against the Corporation

A corporation may institute legal proceedings on its own behalf and sue in its corporate name. A suit does not become defective on the





death of one or more of its members. Similarly the corporation can be sued as though it were an individual, though suit against it should be in its corporate name. Judgment against the corporation is enforced by writ of execution and contempt of Court proceedings may be employed as a last resort. In such judgments its property is not protected merely because it is held for public purposes. In some actions, judgments against the corporation may be enforced by mandamus.

### IX. Summary

The school is a statutory corporation. As such it is subject to the law as it applies to corporations. The board is created by statute and that statute becomes its constitution. The statute lays down the formalities of its creation, operation and control. The board derives its powers and duties from the statute and may not operate outside its expressed and implied provisions. The function of the Courts is to enforce adherence to the statutes.

The corporation, being a legal person, conducts its affairs and binds itself by means of contracts to meet its obligations. It can operate only through the acts of its officers, servants or agents, and thus the Courts hold it responsible for their acts performed in the course of their employment and within the scope of their authority. By common law the board cannot escape responsibility for the manner in which mandatory duties are performed, even by employing an independent contractor, but it can delegate the performance of discretionary duties to an independent contractor. Where there is such delegation the Courts test the relationship of the board to the contractor to determine that



the contractor is truly independent and not merely a servant of the board.

In short, the board, or corporation, is a legal person charged with certain duties and is given limited powers to perform the duties. In the exercise of these powers and the performance of these duties it has the same rights and liabilities as another person would have in similar circumstances.

It was not intended that there should be a detailed examination of the powers and duties of school boards in this chapter. Rather, because most litigation results from some dispute over them, powers and duties are discussed throughout the dissertation. Each succeeding chapter deals with some aspect of the board's powers and duties.



## CHAPTER IV

### SCHOOL BOARD - MUNICIPAL COUNCIL RELATIONSHIPS

In Canada two major governmental units exist at the local level-- one to carry out municipal functions and the other to administer education. Ordinarily these two governments are separated politically from each other, although with their respective constituencies overlapping as they do, they cannot function in isolation from each other. In fact by the nature of functions assigned to them, provincial legislatures have provided that they should govern in relation to each other. Although their effective functioning depends to a large extent on the degree of harmony between them, and the understanding each has of the aims and obligations of the other, there is often friction between the two.

In this chapter there is an examination of the relationship between school boards and municipal councils. Since much of the actual control of local government is directly related to fiscal matters, the question of school finance is the central issue about which the chapter revolves. However, because almost everything else depends either directly or indirectly on finances, the discussion points to other matters, at least by implication. Because provincial legislation regarding local control varies from province to province, the essential features of various provincial arrangements are briefly given before further analysis of what the Courts have had to say in disputes arising between municipal councils and school boards.

#### I. Local Government Relations

Historically education has been controlled in either of two ways--





by elected ad hoc school boards or by municipal and central governments.

The North American, and more especially the Canadian, tradition has been the former, though European systems have favored the latter. The problem of which of the alternatives to employ, or to what extent municipal or central governments should control education arises only where some degree of decentralization has been achieved. Where there is complete centralization, there is no local conflict.<sup>1</sup>

Debate and controversy over school-municipal relations is not new, but it is intensified during periods of rising costs and at times when there is public demand for increased educational and municipal services. Proponents of complete school board freedom from municipal control have argued that boards handle school finance better than would municipal councils; that education is too important a service to be made to compete with public works for financial support; that only with fiscal independence can long-range educational planning take place; that only when boards are fully independent can they be held completely responsible. Proponents of municipal control over school boards advance their own arguments. Education, they maintain, is only one of a number of essential services and must not be permitted to encroach on the financial needs of the others. Were the two governments integrated, there would be better coordination of common services such as libraries, business procedures, maintenance of property and so on. They argue further that the body which collects the money should have control of its spending. What the Courts have had to say in this debate is examined in this chapter.

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<sup>1</sup>E. B. Rideout, "Municipal Participation in Education," Canadian Education, IX:3 (June, 1954) pp. 13-21.



Present Practice in Canada

Variations in provincial organization for local government determines in large measure the rulings by the Courts on school-municipal relations. Since both boards and municipalities are corporations, subject to the provisions of their constitutions, judicial decisions are based on those statutes and hence there are differences from province to province, and details of judgments cannot be generalized. However, with some knowledge of provincial differences, the basic principles of Court decisions can be applied.

British Columbia. In British Columbia boards are elected at large and have financial as well as administrative powers. They requisition for funds on the municipal governments. Municipal governments are obligated to pay the board's requisitions except that if they feel the estimates to be excessive, or if the municipality is unable to pay, the dispute may be submitted to arbitration, the decision of which is binding on both parties.

Alberta. Alberta divisional school boards are elected by wards, or subdivisions, though in cities and towns they are elected at large. In general, school and municipal districts are coterminous, and the school board requisitions upon the municipality which must pay the requisition. In case of dispute the council may appeal the requisition to the Local Authorities Board, which rules on its acceptability. In the all-purpose county the school committee is selected from members elected by wards to the county council. Additional members are appointed to represent towns and villages located within the county and which are part of the county



for school purposes but not for municipal purposes. The school committee draws up and places its estimates before the county council which may adopt them or reject them. In the latter event the committee revises its estimates and again presents them to the council. A 1961 innovation, whereby the provincial government collects the equivalent of thirty-two mills on equalized assessment of the province, and with the addition of grants pays for all "approved" school costs under a "foundation program", is too new to evaluate.

Saskatchewan. School boards are popularly elected (by wards in larger units) and requisition on municipalities for their funds. Municipal councils are obligated to collect taxes and remit them to boards. In special cases requisitions may be questioned and appeal is taken to the Saskatchewan Assessment Committee, whose decision is final. Otherwise boards are independent of municipal governments.

Manitoba. As in other western provinces school boards are elected and requisition on municipal councils. In case of disagreement over the requisition, appeal lies to an Equalization and Appeal Board which has absolute discretion and the power of final decision. Otherwise school boards are essentially free of municipal control.

Ontario. The Ontario system of school and municipal government is more complex than that of the western provinces. Boards of elementary school districts are elected and are fiscally independent, but control of school district boundaries is vested in township councils. Rural high school districts established by county councils, are governed by





boards appointed by the municipalities concerned. More recently there has been union of elementary and secondary school districts and the establishment of boards of education, which are a combination of the boards of the former districts and continue to be elected and appointed as before.

School boards requisition on the proper municipal bodies. Their submitted estimates are examined by the council to determine whether all expenditures are intra vires the board. Expenditures may be subject to the approval of the Ontario Municipal Board. Capital borrowing is done by municipal councils on the request of school boards. The council may pass a debenture by-law on its own volition or may submit the question to the ratepayers.

Quebec. School boards in Quebec levy and collect all school taxes except those of corporations which are paid to a neutral panel and divided between schools of the religious majority and minority on the basis of school population. School boards are almost completely independent of local municipal control, but the provincial municipal commission exercises careful oversight of their expenditures, and supervises local school government.

New Brunswick. New Brunswick has three different kinds of boards which control schools--local rural boards, county finance boards and urban school boards. Only local rural boards are elected. They may requisition in their districts only for additions to the minimum set by the province. The county finance board receives these requisitions which it may accept or alter, and then prepares the budget for the whole county. In urban centres, municipal governments may approve or reject school estimates.



Nova Scotia. Local rural school boards enjoy approximately the same status as those in New Brunswick, the municipal school board being the effective control unit for schools. The latter is made up of appointed members. Urban school boards are also appointed. Though it appoints the majority of members to the board, the urban council, except in Halifax, cannot reduce the board's current estimates. In that city the board may appeal to the provincial cabinet on reduction of its estimates by the city council. In Nova Scotia counties, school expenditures beyond the minimum program are subject to approval by the county council.

Prince Edward Island. Since there are no rural municipal governments in Prince Edward Island, proposed expenditures by school boards are subject to approval of the annual meeting of the ratepayers. If less than the board's proposed budget is voted, the estimates may be reviewed by the central authority. In the cities of Charlottetown and Summerside, the councils have the right to approve or reject current estimates beyond a statutory minimum.

Newfoundland. Since all schools are financed by the central government, there is no problem of control by local municipal authorities over school expenditures.

## II. Two Leading Court Decisions Involving School-Municipal Relations

The leading cases in the area of school-municipal relations are:

Toronto Public School Board v. Toronto<sup>2</sup> and Re West Nissouri Continuation

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<sup>2</sup>(1901) 2 O.L.R. 727, affirmed 4 O.L.R. 468.



School.<sup>3</sup> These cases are discussed in detail for they raise a number of issues and establish principles of which other Courts have taken note, and which lead directly into further issues raised in subsequent litigation.

Toronto Public School Board v. Toronto

The Setting. The Toronto Public School Board was a body elected by the public school supporters of the city for two-year terms. It was charged with the duty of educating the children of compulsory age, which duty implied all the necessary functions connected with providing education. However, the board did not levy its own school taxes. Rather it depended upon the city council to levy and collect taxes upon its requisition. By the terms of existing legislation, the city council was entitled, even required, to examine the estimates submitted by the school board to determine whether proposed expenditures were intra vires the board. Enough detail was required in the estimates to make such an examination possible. If proposed expenditures were found to be lawfully within the powers of the board, the council was bound to collect and pay over the money requisitioned.

The Events. In 1901 the board sent its annual requisition to the city council in due course as required by law. The estimates consisted of forty-two items, including a major one for teachers' salaries. From these estimates the council cut \$69,213, affecting twenty-seven of the original items but primarily the item for salaries.

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<sup>3</sup>(1912) 25 O.L.R. 550, 3 D.L.R. 195 varying 1 D.L.R. 252.





Regarding salaries, the board had followed approximately the same pattern, with complete success and without opposition, for the four previous years. In 1901, as in the previous years, it prepared a list of teachers who had been employed, or reemployed, under sealed contract, at the end of the year 1900, at such salary and for such school as the board might from time to time determine during the next year. Contracts called for monthly payment of salary, and could be terminated by either party in accordance with the regulations of the department of education. Salary and name of school were entered beside the name of each teacher on the list, the salary figure being that of the previous year but subject to review early in the new year.

The reason for the board's procedure was that since employment ran according to the calendar year, the board could engage teachers during the Christmas vacation so as to have the schools staffed on January 1, while at the same time it could leave the final determination of salary and placement of teachers to the new board, for one-half the old board would retire prior to elections early in the new year. In this way, the old board would not fetter the new members in fixing salaries for the time when they would be in office and therefore responsible.

In March, 1901, the new board voted to increase the salaries of teachers employed previous to that year, the increase to be in accordance with an agreed scale. The total of these salary increases amounted to \$41,000.

It was the \$41,000 increase in the salary estimates to which the city council objected, demanding that the board pay only the amount stipulated in the actual contracts signed at the end of 1900. This the



board refused to do. In addition, other cuts were made on the grounds that the board had not provided enough details of their proposed expenditures. Thereupon the board initiated legal proceedings, applying for an order to compel the council to comply with its requisition. The action was tried before Mr. Justice Street.

The Trial Judgment. The Trial Court, after study of the estimates, restored some of the amounts, but left others as reduced by the city council. In particular, it did not change the reduction in the item for teachers' salaries. In summary Mr. Justice Street laid out the following principles of school board relations to the city council:

I have covered all the items which seem to require special notice. Small sums have been struck off a number of other items, and the action of the council in regard to them is sought to be sustained upon the ground that better particulars might have been furnished. Reasonable particulars, however, seem to have been forthcoming in all cases in which they were asked, and it is to be borne in mind that when proper estimates are furnished by the school board, and the proposed expenditure is within their powers, the city council has no right to dictate to them as to the manner in, or intent to which, they should exercise any discretion vested in them by the School Act...The Legislature has thought proper for many years to give this very large measure of discretion in regard to expenditure to those in charge of the school system, and it is of course the duty of the city council to carry out the law.<sup>4</sup>

Neither the school board nor the city council was satisfied with the judgment and both appealed. The appeal and cross-appeal were heard in Divisional Court.

Judgment on the Appeal. The main question before the Court was: Has the city any right to control, modify or diminish the estimates of the school board?

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<sup>4</sup>2 O.L.R. 727, at p. 734.



On the question of salaries the Court disagreed with the judgment in the Court below which had apparently considered the increases as a sort of bonus over and above salary. Instead, the agreement of the teacher was not only to work at the salary set opposite his name but "or at such salary and in such school as they (the school board) may from time to time appoint." Thus the board was obligated to pay either the salary named or what it decided from time to time to pay. In the past the board's practice had been to make annual increases, though these were not the same from year to year, nor was the board obligated to make them. Thus in previous years, by virtue of this kind of agreement, the salary actually paid was not the amount set beside the name of the teacher; but rather the salary fixed by the board of that year, including increases allowed for the year. Therefore it appeared that the board was now obligated to pay the amount it had determined.

Turning to the question of the city council's right to interfere in the affairs of the school board, the Court held that boards are required by law to provide education for all children of school age. It would therefore be impractical to permit municipal councils power to restrict them financially. Council had claimed the right to call upon the board to produce all contracts and agreements between the board and teachers or other employees and to require it to show that the sums in its estimates were indeed legally required by its contracts. No such inquiry by the municipal council was ever intended, said the Court, for such a procedure would be too cumbersome and time-consuming.





The words of Chief Justice Meredith are clear and emphatic:

It would seem to me therefore, a much more reasonable construction to give to the Act to hold, as I think we should hold, that all the municipal council has the right to ask is, that which the Legislature has termed an "estimate" shall shew that the school board has estimated the amounts required to meet the expenses of the schools for the current year, and the purposes for which the sums are required, in such a way as to indicate that they are purposes for which the school board has the right to expend the money of the ratepayers, and, when that has been done, the duty is imposed upon the municipal council for raising by taxation (except in special cases for which provision is made in Sec. 74) the sums required according to the<sup>5</sup> estimate to meet the expenses of the schools for the current year.

...The school board, like the corporation, is a corporate body, and the members of which it is composed are, like the members of the council, elected by the ratepayers, though the electing body is different, and are answerable to their constituents for the manner in which they execute the important trusts which have been reposed in them. Upon the school board is imposed the duty of making provision for the public school education of the children, and to it is given the right to determine...the amount proper to be expended for school purposes and within the scope of their powers.

...The discretion exercised by the school board as to these matters, the municipal council has no authority to question; still less has it any right to substitute for the judgment of the school board, acting within the scope of its powers, its own judgment, even though it may be apparent that the school board has not exercised its discretion wisely; for the action it has taken and for any unwise discretion it may have exercised, the members of the board are answerable, not to the municipal council but to their constituents.

I venture to think that the object of the Legislature in providing as it has done for the raising of the money required for public school purposes was simply to avoid the expense and inconvenience to the ratepayers of the double system for the imposition and collection of rates, one by the municipal councils of municipal rates and the other by the school boards of public school rates, and in confirmation of this view I may point out that by The Public Schools Act, 1885, the same system was applied to rural school sections, the trustees of which before then had the option of levying and collecting their own rate or of requiring the municipal council to collect it.

What I have indicated as my opinion has of course no application where bad faith on the part of the school board is shewn, such as an

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<sup>5</sup>Ibid., at p. 743.



attempt under cover of a general estimate to provide for illegal expenditure, and I have no doubt that in a case of that kind the Court would not permit the extraordinary remedy of mandamus to be used to compel the levying of a rate to provide money which it was proved was intended to be used for such a purpose.<sup>6</sup>

The Court allowed all parts of the estimates except for one item-- deficits carried over from the previous year, and these were disallowed only because the Act made no specific provision to include them in current estimates. In conclusion the Court quoted with approval Sedgewick, J., in C. P. R. v. Winnipeg.<sup>7</sup>

The school trustees had the right of determining without question the amount which was to be raised for public school purposes within the city limits and of authoritatively calling upon city authorities to collect and hand over that amount while the latter authorities were under an absolute obligation to obey the behests, in that regard, of the school trustees.

From the judgment on this appeal, the city of Toronto made a further appeal to the Court of Appeal. Osler, J. A., gave the judgment of the Court, which is also clear, emphatic and self-explanatory:

Each of the parties is a municipal corporation...The council and school board are elected by different classes of ratepayers, though many of them are electors in both classes, and to their own constituents each is responsible. Each corporation is bound to the performance of certain statutory duties within the range of which, except in so far as they are reciprocal, neither is subject to be controlled by the other.

...Section 65 (of 1 Edw. VII, C. 39) enacts that "it shall be the duty of the trustees of all public schools, and they shall have power..." to do the several things specified in the subsequent sub-sections. These powers and duties are in many respects described in general language, and some of them arise by implication. The exercise of some powers is discretionary and where that is the case, it is at the discretion of the trustees only, except where specially provided, as for example in ss. 76 and 78.<sup>8</sup>

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<sup>6</sup>Ibid., at p. 744.

<sup>7</sup>(1900) 30 S.C.R. 558, at p. 563.

<sup>8</sup>4 O.L.R. 468, at p. 470.





On the question of requisition by the school board and collection by the municipality, he held that the execution of the powers granted and the duties imposed by the statute involves the expenditure of money--in large cities, large amounts of money. This money is to be provided through grants and taxes. If the board had to provide its own assessors and tax collection office and staff, an extra burden would be placed on ratepayers. Therefore, from motives of convenience and economy, the legislature had made municipal councils the most suitable agency for collection for school expenditures, and this had been its policy from 1850 onwards.

This, however, having regard to the constitution of the school corporation and their independent powers of action, by no means suggests that the council has, or should have, a controlling hand over their expenditures. They are in no sense the agents of the council...Rather it is the contrary case...that school trustees are the representatives of the people as to school expenditures; just as aldermen--members of the council--are the representatives as to street improvements, and municipal government, etc.<sup>9</sup>

Thus, the legislation provides a simple means of getting school money. Trustees submit their estimates, council taxes under the provisions of The Municipal Assessments Acts, and turns over funds to the school boards. In no way is such tax money to be considered as belonging to the municipality. Since there is nothing in the Act which gives the council any control over school matters, it should be clear that when trustees have submitted proper estimates, the council's duty is simply to levy and remit the moneys collected for such purposes.

Reemphasizing the respective areas of jurisdiction of school boards

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<sup>9</sup>Ibid., at p. 471.





and municipal councils, Osler, J. A., concluded:

Within the range of the subjects in respect of which the school board must, or may exercise their powers and duties, they are the judges of what expenditure is necessary and proper; the estimate of that is their estimate, and, when they have sent it in to the council, their final estimate...An estimate is still an estimate even when it represents the final judgment of the body whose right and duty it is to prepare it, of what is required; and when that body submits it to the council, the estimate is merely laid before it or brought under its notice to be dealt with as required by s. 71(1).<sup>10</sup>

To summarize: the right of the school board in preparing their estimate is to include therein everything that, in their best judgment, may be needed to meet the legitimate expenditures--that is to say, expenditures upon objects or for purposes within their lawful authority; and their duty to council is to prepare it in such a manner as to shew generally what these purposes are and what is required in respect of each. The right and duty of council is to examine the estimate so far as to ascertain that it is for purposes intra vires the school board. If an item or class of items is clearly for a purpose for which the board is not authorized by law to expend money, it is the right and duty of the council to reject it. But beyond this, in my opinion, the council cannot go.<sup>11</sup>

...As regards the item over which the main battle has been fought, and which indeed, seems to have provoked the council into litigation, viz., for school teachers' salaries, I have been unable to feel any doubt. I can see nothing illegal in the agreement under which the teachers were re-engaged at the end of the year 1900, looking to, or providing contingently for, an increase of the salaries of the same teachers by the new board the following year. The council is not entitled to call for or to inspect the contracts which the board make with the teachers; nor is it necessary in order to entitle the board to place the item of salaries in their estimate, that the contracts should then have been actually entered into. If the sum required is what the board, in good faith, think necessary, having regard to the number of teachers and the arrangements they contemplate making with them, the council must be satisfied.<sup>12</sup>

One further question in the final appeal, which was dismissed, was not decided because it had not been specifically placed before the Court. That was the question of whether the board could include deficits

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<sup>10</sup> Ibid., at p. 472.

<sup>11</sup> Ibid., at p. 473.

<sup>12</sup> Ibid. at p. 474.



from the previous year's operation in its current estimates. The Court below had not permitted the board to do so, but in the higher Court, passing reference was made to it, indicating that perhaps this power was to be implied. The question was decided in a later case.<sup>13</sup>

### Re West Nissouri Continuation School

This is not really a single case but a series which were before the courts concurrently and successively. These cases illustrate not only the legal relationships between local government bodies but also the effect of legislation in the face of strong local feelings. Local governments are not permitted to modify the provisions of the statutes to satisfy the demands of their constituents when these demands fall outside the authority of the governing bodies.

The Setting. In 1888 the council of the County of Middlesex, Ontario, passed a by-law under its statutory authority whereby the electoral division of East Middlesex was constituted a high school district. However, no further action was taken: no trustees were appointed, no site was purchased or chosen, no school was built and no rates were levied. In January, 1910, in the face of much local opposition, the county council passed another by-law establishing the township of West Nissouri, which was part of the previously established high school district, as a continuation school district. The by-law, though not directly attacked, was considered locally to be void by virtue of legislation which provided that no continuation school district could be established within the boundaries of a high school district.

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<sup>13</sup>See Re Athens High School Board and Rear of Yonge and Escott, pp. 133-135, infra.





However, a continuation school board was elected and the board asked the township council to pass a by-law authorizing debentures to raise \$7,000 to purchase a site and erect a school. The township council complied with this request and its by-law was attacked by a ratepayer.<sup>14</sup> In that trial it was held that by Sec. 4 of The High Schools Act,<sup>15</sup> no high school district had existed in fact. The section provided that whenever a high school district had "existed in fact, for three months, it shall be deemed to be a high school district under the new Act, no matter whether originally regularly formed or not..." However, high school districts which had not existed in fact, but only on paper, perished as a result of repeal of the legislation under which they were formed. Thus the East Middlesex High School District did not exist when the county established the continuation school district in the township of West Nissouri. Therefore, too, the township by-law was not open to objection. This judgment was sustained on several appeals.

While its by-law was being contested in the Courts, the township council quite properly held up action to raise the \$7,000 by twenty-year debentures at five per cent interest. In the meantime, however, municipal elections returned a new reeve and two new councillors to the township council on the strength of their promise to repeal the contested by-law. In July, 1911, the township council accordingly passed a new by-law repealing the former one.

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<sup>14</sup>Re Henderson and West Nissouri (1911) 24 O.L.R. 517, affirming 23 O.L.R. 21.

<sup>15</sup>9 Edw. VII, c. 9.





The school board had also proceeded with its business and on March 20, 1911, had submitted a requisition for \$1,000 for school maintenance. Council took no action on the requisition and on April 5 a delegation of the board waited on council to urge payment of the money. The council replied only that the matter was being considered by its solicitors. Subsequently the board's solicitors wrote letters to the council demanding payment, but the letters were ignored. The board then applied to the Court for mandamus to compel council to issue the necessary debentures and to pay over the requisition for school maintenance.

Judgment of the Trial Court. The board's application was allowed and mandamus was granted to compel the council to comply on both requests. In his judgment, Middleton, J., held that council had forgotten the sphere of its authority when it sought to review the action of the school board and to protect ratepayers from its action. Council had the attitude that it had been elected on the issue of the establishment of the continuation school, and therefore members considered it their duty to prevent its establishment. Such an attitude was entirely improper.

In our complicated system of municipal government, each subordinate body is supreme within its own limits and municipal government cannot be carried on if one of these subordinate bodies, not content with its own supremacy within the ambit of its jurisdiction seeks to interfere in matters outside its jurisdiction, and, sitting as a self-constituted court of review, to render nugatory the action of other representative bodies with which it, in its wisdom, does not agree.<sup>16</sup>

The municipal government was wrong in asserting that the ratepayers disagreed with the board, for it had no voice or control in this question.

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<sup>16</sup>  
1 D.L.R. 252, at p. 254.



It was the county council, and not the township council, which set up the continuation school, and the latter had no power to review such an action.

It is the duty of the Court to prevent the invasion of one municipal body of the legislative territory assigned to another, and to compel the discharge by one municipal body of any duties which it may be called upon to discharge which are merely ministerial and ancillary in their nature.<sup>17</sup>

The legislature, the Court maintained, has placed school affairs in the hands of school boards and not those of municipal councils. At the same time it has provided that council shall be the hand by which money for school purposes is raised. According to the statutes, council shall collect for maintenance and improvement of schools. In case of a requisition for new schools, council may consider and approve or disapprove of the request to issue debentures. If it disapproves, it must, on request of the board, submit the question to the ratepayers. If it approves, then it becomes the duty of council to pass the by-law forthwith and get the money for the board.

In this case, on the question of the by-law for debentures, council had approved the board's request and had passed a by-law in compliance. Later it had repealed the by-law, but this was beyond its powers. Once it had given its consent, council had no power to change its mind. The statute does not extend so far.

On the question of the requisition for maintenance, the township council pleaded lack of money to pay because of the delay occasioned by the hearing in Re Henderson and West Nissouri. The Court ruled however, that the question of difficulty because of its earlier default was not an

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<sup>17</sup>Ibid., at p. 254.



answer to the imperative duty to provide the amount necessary for school maintenance. Trustees had the right to requisition, and council had the duty to pay over the amount required.

The township council appealed to the Divisional Court from this judgment.

Judgment on the Appeal. This Court dismissed the appeal on the requisition for maintenance. The board had fulfilled all the necessary formalities in exercising its statutory power to requisition and therefore council was obligated to comply. Regarding the debenture by-law, however, it held that the board had not made a formal demand on the council to enforce the by-law, and therefore mandamus could not be granted. In view of the circumstances, however, the dismissal of the board's application for mandamus should be without prejudice to another application for it after formal demand had been made and the council had again refused. In other words, the Court was willing to instruct the board on how it should proceed to achieve its legal rights.

Although this was the end of the legal proceedings in the case, it was not the end of the story. The sequel came in another case<sup>18</sup> which, although not of great importance in determining intergovernmental relations, is of interest as the conclusion of the dispute over the establishment of this particular continuation school.

Following the appeal in the previous West Nissouri case, school board elections returned three new members, opponents of the continuation

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<sup>18</sup>Re West Nissouri Continuation School (1912) 22 O.W.R. 842, 3 O.W.N. 1623, 4 D.L.R. 847, affirmed 23 O.W.R. 601, 4 O.W.N. 497.





school, to the board. At its first meeting after direction by the Appeal Court in the previous case, the board considered a resolution to make formal demand on the township council to activate its by-law on raising \$7,000 by debenture. The resolution was defeated on equal division of the board, with the new members voting against it. Resolutions to requisition a further \$2,770 for maintenance, to advertise for teachers, and to have architects draw up plans for the new school were also defeated--on the same division of the board. No amendment was moved to any of the resolutions, and the meeting adjourned.

At the next meeting, approximately one month later, a resolution to provide adequate school accommodation was defeated. At this point the opposition members moved that they form a committee of three to investigate renting temporary premises. This notion was defeated by members favoring the establishment of the school, because they felt that it was not a motion in good faith but a delaying tactic. Following this meeting the trustees favoring the establishment of the school applied for a court order to compel the others to perform their duties as trustees.

In court it appeared that the opposing trustees were simply unwilling to build a new school, and not opposed to establishing the continuation school itself. The Court was reluctant to interfere in what seemed to be merely a matter of internal disharmony in the board. However, because applicants' counsel argued that this was a tactic to delay action beyond the deadline for making requisitions to the municipal council, the judge agreed to adjourn the hearing until after the next board meeting. Minutes of that meeting would be received in evidence to settle the question.

When the Court reconvened, it was apparent that there had indeed



been delaying tactics and that the opposing trustees had no intention of discharging their statutory duty. Mandamus was issued to compel them to do so.

#### Significance of the Judgments in the Two Cases

The findings below come out of cases tried in Ontario and are particularly applicable there. Although these are not binding precedents in other province, where statutory provisions are the same or similar to those which were involved here, they would be very powerful persuasive precedents.

- (1) The Courts have ruled that municipal councils and school boards are supreme within the limits of their respective jurisdictions. Therefore, a municipal council has no right to review or render nugatory the action of a school board which exercises powers conferred on it by statute.
- (2) The Courts prevent invasion of the legal jurisdiction assigned to the school board, and compel by Mandamus the discharge of council's statutory duties which are ministerial and ancillary in nature and necessary for properly carrying out the lawful actions of the school board. The fact that taxpayers disapprove of the board's actions has been held to be no justification for interference by a municipal council when the statute does not provide for such interference.
- (3) Where legislation requires approval by the municipal council of a school board's application, once the approval is given by council, the Courts have held, it must do everything necessary to comply with the request. This duty cannot be evaded by subsequent disapproval



or repeal of a by-law passed in compliance with the duty.

- (4) School boards have the right to determine their needs for the current year in respect of school operation and maintenance and, unless the statutes provide otherwise, the municipal council is under the absolute obligation to comply with the board's proper requisition.

### III. Other Cases Involving School-Municipal Relations

#### Deficits: Are They Properly Part of Annual Requisitions?

The question of what to do with deficits from the past year in relation to current school board estimates was briefly considered in the Toronto case, but because it was not specifically argued in the final appeal, the Court left it open for future judicial consideration. In the trial judgment of the Toronto case Street, J., had held:

The only money which the school board has to spend in each year is that which the city council levies for it, and the city council cannot, under the Act, be called upon to levy anything beyond the expenses of the schools for the current year: it cannot be called upon to levy anything for debts which the school board has chosen to contract in the previous year.<sup>19</sup>

The question came up again in Re Athens High School Board and Rear of Yonge and Escott.<sup>20</sup>

In this case the board requisitioned on the municipality including in its estimates a deficit of \$916.20 from the previous year. The municipality agreed to levy for the whole amount except the previous year's deficit, maintaining that the statutes permitted only requisitions for school expenses for the current year. In the hearing of

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<sup>19</sup> 2 O.L.R. 727, at p. 732.

<sup>20</sup> (1913) 29 O.L.R. 360, 14 D.L.R. 543.





the board's application for mandamus to compel the municipality to pay over the whole requisition, the Court held in favor of the board.

It pointed out that the statute places the whole duty for providing education on school boards, and gives it authority to apply to the municipal council for the sums required, to carry on its work. Except for grants and fees its sole income is from ratepayers through the council. Council is a collection agency only, in so far as schools are concerned. In this case the previous year's requisition had been too little to cover the actual expenses because the number of pupils was greater than had been anticipated and the school board had had to appoint another teacher. There was no suggestion of mala fides on the part of the board. Its only fault was that it had not requisitioned enough for unforeseen contingencies.

Said Middleton, J.:

It would be a most serious reflection upon the legislation if by any such reasoning the ratepayers could be relieved from paying for services incurred on their behalf by their duly elected representatives; and it would be equally unfortunate if the failure of the board to demand a sum sufficient to cover the necessary outgoings is to impose personal liability upon the members of the board.<sup>21</sup>

Rather, the Court pointed out, the school board had a debt and because it had property, the debt must ultimately be paid. In municipal cases the principle had been upheld that municipal corporations could levy in the following year to cover deficits of the previous year. There was no reason why that principle could not apply to school boards. If such a legitimate requisition could not be obtained from the municipality, it could not be obtained at all. A legitimate creditor could then sue

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<sup>21</sup>29 O.L.R. 360, at p. 361.



the board and take school property in execution, and without this property school could not be maintained, nor education provided.

A totally different consideration would arise if the board were attempting to shift the burden of taxation from one year to another, or if a contract were made in one year to be payable in another. However, in the absence of bad faith, the board alone should determine the requisition and council had no right to criticize the board's estimates.

#### Requisitions by Boards on Municipalities

Requisitions in Good Faith. The leading cases discussed at the beginning of this chapter laid out the principle that proper requisitions cannot be questioned by municipal councils. The principle has been upheld and expounded in numerous other cases, both before and after 1901. Thus in Re Oakwood High School Board and Mariposa<sup>22</sup> Osler, J. A., held that if the board's requisition is made in time and in good faith, councils have no discretion. They must raise the money, whatever the amount, for any of the purposes authorized by the Act. But council is entitled to demand that the requisition be a corporate act, not merely a verbal request, however unanimous, of the individuals comprising the corporation, and that the requisition specify the purposes for which the money is required.

Although the council may require such formalities as above, it need not do so, but may pay the board's requisition even though not authenticated by the board's seal. In such a case an individual ratepayer

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<sup>22</sup>(1888) 16 O.A.R. 87, reversing 15 O.R. 686.



has no right to object.<sup>23</sup>

A Saskatchewan justice, Dickson, D.C.J., was in complete agreement with the reasoning above when he said:

There is no greater obligation upon the municipality under The School Assessment Act than to procure for the school district through the proper channels, the amount of its annual demand, and pay it over. When that is done, the whole obligation is discharged.<sup>24</sup>

Estimates Submitted in Bad Faith. The discussion to this point has concerned the respective duties of school boards and municipal councils when the estimates are made in good faith. The case of London Board of Education v. London<sup>25</sup> illustrates the view of the Courts when this is not so.

In this case the school board submitted its estimates of \$123,089 for the year to the city council and the council took exception to only one item although the whole requisition was submitted after the statutory deadline. The item in dispute was one for \$17,400 for "repairs and improvements to schools." No further details were given either to justify the amount or to show that it would be sufficient. The council asked for more information on the item but the board refused to give it, and council rejected the item. The board applied for a mandamus to compel council to pay its whole requisition.

The Court held that the council was justified in its attitude. An

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<sup>23</sup>Coleman v. Kerr (1867) 27 U.C.Q.B. 5.

<sup>24</sup>Vonda Roman Catholic Separate School District v. Vonda (1921) 65 D.L.R. 762, at p. 763.

<sup>25</sup>(1901) 1 O.L.R. 284.





estimate should be something showing that the sum was necessary and sufficient. No such estimate had been submitted to council, nor apparently to the board itself. In this connection Meredith, J., said:

...Plaintiffs are an independent corporation, generally speaking, and when acting in good faith and within their powers, in no way subject to the supervision or control of the municipal council, or any other body or person.

From these facts the impression is made, upon some minds, that the council can have no rightful concern in any way, regarding the money required by the school board and that therefore it is<sup>26</sup> enough for the board to state merely the amount required by them.

Actually, the Court maintained, council has the right and duty to take care that the board does not exceed its powers, and itself be made the instrument whereby the board exceeds its powers. Not only may the council then prevent a levy ultra vires the board, but a ratepayer may bring action against both corporations if it fails to do so.

In this case the board's usual item for repairs was about \$2,500. The fact that this had suddenly jumped to \$17,400 without explanation, had raised some grave doubts as to its validity, especially in view of the fact that the council had recently refused to pass a by-law for borrowing on school debentures without submitting the question to the ratepayers. The Court sensed that the board was using this device to circumvent a vote of the electors. Because there was bad faith on the part of the board, the Court held strictly in favor of the municipal council.

#### Respective Jurisdiction of Boards and Municipal Councils

In the leading cases cited it was held that the board and the

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<sup>26</sup>Ibid., at p. 289.



municipal council were corporations, each of which is supreme in its own jurisdiction. This principle has been upheld and amplified in a number of cases. Thus in Re Almonte Board of Education<sup>27</sup> Middleton, J.A., said:

As part of the scheme of municipal government in the province various boards are established having plenary powers in respect of the several statutes creating them. These boards are given the power of spending money in carrying on their operations. Instead of conferring upon such boards the power of levying rates to meet their requirements, they are directed to make requisitions upon the municipal council to raise the money required as part of the general levy for municipal purposes.

It is now established law that this does not confer upon the municipal council any power to review the action of the requisitioning board in making the requisition or in determining upon the course of action which results in the expenditure which makes the requisition necessary. In all matters intrusted to the board its jurisdiction is supreme, and as to requisitions made for the resulting pecuniary obligation, the municipal council is used as a mere machine to levy the resulting tax.

If however, the board goes beyond its statutory jurisdiction, and does or contemplates doing something ultra vires, it has no right to demand the levying of a rate for such a purpose, and if the municipal council refuses to act, the Court will not grant a mandatory order. A council is justified in making such inquiry as is necessary to assure it that the demand is made for a purpose within the jurisdiction of the demanding board, and when a mandatory order is sought, the court will stay its hand if it appears that the purpose for which the money is sought is not within the statutory powers of the applicant.<sup>28</sup>

Although this statement was made in reference to the system of local government in Ontario, and applies specifically in an Ontario context, the reasoning might well apply in all provinces. Subject to the provisions of the provincial statutes, the municipal council and the board of education each represent the community, and each is responsible to its constituents rather than to the other. Each has its own functions. Neither is given

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<sup>27</sup>64 O.L.R. 505, (1930) 1 D.L.R. 568.

<sup>28</sup>64 O.L.R. 505, at p. 508.





any power to supervise or control the other. Each is held to be supreme in its own sphere.

Upon occasion it is implied that the school corporation is a sort of junior partner in local government, and that its powers of operation are restricted to the geographic area over which it exercises its authority. Such reasoning was refuted in the Ontario Court of Appeal by Robertson, C.J.O., in Murray and Brighton Public School Trustees v. Northumberland and Durham.<sup>29</sup>

The dispute before the Court was whether or not a continuation school board was entitled to provide transportation for county pupils living outside the board's district. In the opinion of the trial judge, the school corporation had no power to operate beyond the boundaries of its section without a specific legislative grant of such powers. The learned Chief Justice to whom the case was appealed, pointed out, however, that to hold this view would make it impossible for the board to perform its statutory duty. It must go outside its boundaries to procure such instructional materials as maps, books and pupil supplies, to get a teacher, to have a bank account, to borrow money and to do business in another town.

I know of no principle that requires that such a corporation must have express authority to go outside the school section to do these things and many others that are proper and necessary to be done in carrying on the school. The corporate existence of the board is not confined to the school section and I do not think its powers are so confined, except when necessary from their very nature.<sup>30</sup>

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<sup>29</sup>(1939) O.W.N. 565, (1939) 4 D.L.R. 738, reversed (1940) 2 D.L.R. 28 which was affirmed (1941) S.C.R. 204, (1941) 2 D.L.R. 273.

<sup>30</sup>2 D.L.R. 28, at p. 32.





Interference by the Municipality in the Board's Affairs

Reference has been made to the fact that municipal councils do not have power to interfere in the rightful jurisdiction of the board. This fact is emphasized in Re Goderich Collegiate Institute and Goderich.<sup>31</sup> The school board had, in 1934, made its requisition for \$13,288 on the town council as provided by law. The town council, however, determined to pay only a portion of the requisition, because, in its opinion, the board was paying teachers' salaries which were too high. By paying only part of the requisition, the council hoped to force the board to reduce salaries. The board applied for mandamus to compel council to pay the whole requisition. This was granted by the Court which stated emphatically that in such a matter the board was the sole judge and the attitude of the council could not be condoned.

Surpluses Resulting from Levies on the Board's Requisition

It is well established that when the statute provides that boards have the right to requisition on municipal councils, the latter must act as collecting agencies for them. Municipalities are therefore permitted to add to the levy enough to defray the costs of collection, and in addition, they are permitted to increase the levy to allow for non-payment by some individuals of their taxes in the current year, for it has been held that the municipality must pay over the full amount of the board's requisition. The council may not charge the board a share of collection costs and unpaid taxes, deducting them from the requisition.

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<sup>31</sup>(1934) O.W.N. 515.

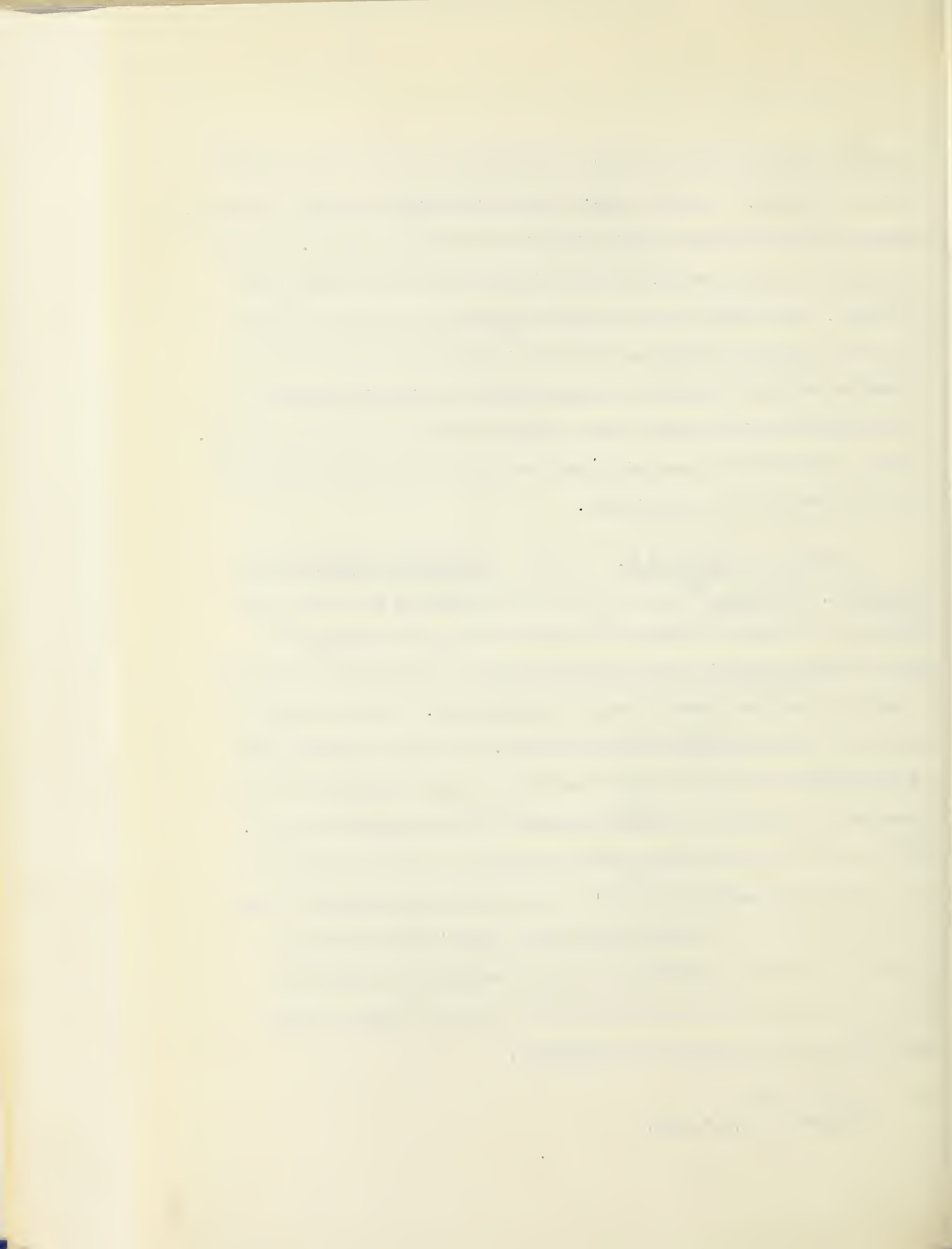


In other words, the whole of taxation machinery is in the hands of the municipal council. When the council strikes its rate, it cannot, therefore, estimate exactly what the actual collection on the rate will be. In case of a deficit in collections, it may add such deficit to the rate of the next year. What happens when a surplus accumulates in moneys collected for school purposes? Further, when money is borrowed by the council by debenture for school purposes and such money is not totally expended, to whom does the surplus belong? These questions have been before the Courts. However, the following cases might have been judged differently had there been different statutory provisions.

Surpluses on Requisition. The case of Nottawasaga Public School Trustees v. Nottawasaga<sup>32</sup> sets out the basic principles involved in the question. As usual, the board had requisitioned on the municipality for its funds from 1881 to 1886 and each year the municipality had levied a small sum over and above the amount requisitioned. Over the period in question, a total of \$205.50 had accumulated. The board contended that it was entitled to the whole amount collected on its requisition, but the municipality maintained that this was part of its own general revenues. The Court held that the money actually belonged to the school board, but on a technicality making the board's legal proceedings defective, it did not grant the sum to the board. From this judgment the municipality appealed and asked the Appeal Court whether trustees are entitled to surpluses produced by a rate levied in good faith and imposed by the municipality for procuring the sum demanded.

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<sup>32</sup>(1888) 15 O.A.R. 310.



The Court said: yes, such a surplus belongs to the board. If a rating by-law produces a large surplus it is liable to be quashed, but not if the excess is small. Such excess may not, however, be appropriated for general municipal purposes. Having been received from the ratepayers for school purposes, it must be used for such purposes. Until 1879 trustees had had the right to collect their own rates, and then surpluses obviously belonged to them. There is no just ground for distinction when the municipality does the collecting. The Public Schools Amendment Act, 1880,<sup>33</sup> enacted that expenses involved in the collection of school rates were payable by the municipality and the rates collected were to be turned over to the trustees without any deduction whatever.

A consideration not before the Court, but which has an important bearing on the issue, is the fact that where separate schools are involved, the public school board and the municipal council represent constituencies which, although overlapping, are not identical. Hence rates collected from public school supporters for public school purposes, should not be used for municipal purposes for in that case the rates of public school supporters would be used to subsidize separate school supporters. The converse argument is equally true.

An Alberta case also treats the question of surpluses on requisitions. In Spruce Grove Rural Municipality and Huron School District and Splan School District<sup>34</sup> trustees of Huron School district had requisitioned for \$1,300 and those of Splan School District had requisitioned for \$1,500. At the time (1918)

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<sup>33</sup> 43 Vict. c. 32, s. 4.

<sup>34</sup> (1919) 1 W.W.R. 4, 44 D.L.R. 153.





the municipality held \$1,419 for Huron and \$2,245 for Splan, these being surpluses from levies in 1916 and 1917. Although it had sufficient funds to meet the current requisitions, the municipality, being involved in a legal dispute over the previous year's levy and fearing that it might lose the money held, proceeded with a 1918 levy. The municipality was successful in its litigation and found itself with large surpluses in addition to current taxes which were being collected. To resolve the quandry, the municipality, the school boards and certain ratepayers prepared and submitted three questions to a Court as follows:

- (1) How should the funds in the hands of the municipality be used?
- (2) Was the 1918 assessment and levy legal?
- (3) If it was not legal, what should be done with taxes which had already been collected?

On the first question the Court ruled that because the municipality was required by statute<sup>35</sup> to pay a school board's requisition, it was entitled to levy extra to allow for its expenses and the non-collection of taxes. If there was a balance to the credit of the board, this should be applied toward the next year's requisition and the municipality should levy for the remainder.

On the second question the Court ruled that the 1918 levy was illegal because the municipality already had sufficient money on hand to meet the requisitions. Although this was unfair to the ratepayers of 1916 and 1917, it was the only reasonable way to deal with the question. The proper theory of taxation is that each year's burden should be borne by that year's taxpayers. In this case it was impossible to adhere to

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<sup>35</sup>The School Assessment Act, C.O.A. 1915, c. 105, s. 24(a)  
The Municipal District Act (Alta.) 1918, c. 49, s. 295.



this because tax arrears from past years were being used for current purposes and some current taxes were still unpaid. The whole situation was an accumulation of these effects.

On the third question the Court suggested that although such a situation had not arisen before, in equity, the 1918 levy should be refunded to those who had paid it. In conclusion the Court warned the municipality against making outrageously high levies as it had done in 1916 and 1917.<sup>36</sup>

Surpluses from Debentures. The question of what to do with money raised by debentures by the municipality for the school board, but which money was not entirely expended in the project for which it was raised, arose in Clarkson v. Alliston.<sup>37</sup> In this case the board had obtained \$40,000 for building a new school through the municipal sale of debentures. At the end of the building program, \$3,880 was still unexpended and ownership of this surplus was disputed. In the action which followed, the question before the Court was: to whom did the money left over belong?

The answer was given by Garrow, Master:

...Moneys realized by a municipal corporation by the sale of debentures for the purpose of building a new or improving an old school, belong to the school board as much as do the annual rates collected by the municipality, and when they are paid over to the school board it is not a payment of moneys of the municipal corporation, but a transfer to the board of funds which are already its own; that is to say, its own in the sense that the school board is a corporate body authorized by law to receive and disburse school

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<sup>36</sup>The matter of surpluses resulting from school levies should be considered in the light of cases discussed in Chapter V.

<sup>37</sup>8 C.B.R. 587, affirmed 10 C.B.R. 65, 62 O.L.R. 149, (1928) 2 D.L.R. 715.



moneys for school purposes. And, similarly, I would hold that even if the municipal corporation were entitled to be repaid the unexpended balance... it would hold the moneys as trustee for the board, and not as its own.<sup>38</sup>

The municipal council appealed but the ruling was upheld.

Wright, J., enlarged on the reasoning of the Court below:

When these provisions (of school legislation) are considered in connection with the fact that the constituencies represented by the public school board and the high school board are different from the constituency under the jurisdiction of the municipal council, it must lead to the inevitable conclusion that the moneys do not belong in any sense, except as custodian, to the municipal council.

In the present instance only the public school supporters in the Town of Alliston can be required to pay the tax rate imposed to pay off the debentures issued for public school purposes. In the case of the high school board, it represents not only the ratepayers in the Town of Allister but also the ratepayers in the three adjoining townships...and as against the ratepayers of these townships I think it could not be contended that the Town of Alliston owed moneys.

That the moneys were held by the town in trust for the school board is, I think, the logical result of the decisions in the cases in our own courts to the effect that it is not necessary for the school board to bring action to recover these moneys, but that a mandamus will be granted against the municipal council requiring it to pay over the moneys to the school board.<sup>39</sup>

Again it may be commented that although this case refers to a specific situation in Ontario, the fundamental principles of the judgment may be generalized.

#### School-Municipal Relations in Respect of By-Laws

In provinces where there is statutory provision under which school boards are required to apply to municipal councils to pass by-laws, as for raising money by the sale of debentures, there is often dispute in

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<sup>38</sup>62 O.L.R. 149, at p. 155.

<sup>39</sup>Ibid., at p. 158.





interpreting the respective powers of the bodies concerned. The question was raised and answered in Re West Nissouri Continuation School discussed above, and the Courts have had other occasions on which to clarify relations when disputes have arisen.

In Re McGloghlon and Dresden<sup>40</sup> a ratepayer applied to a Court to quash a town by-law for raising \$20,000 to build a school, on the grounds that it had not been sanctioned by the ratepayers; that the by-law stipulated the site on which the school was to be built, thereby interfering in the board's jurisdiction; and that the board had not made a proper request to the council for passing such a by-law. The Court concurred in the validity of the last two criticisms, and ruled that the by-law must be quashed.

Although council could pass a by-law without referring it to the ratepayers, it could do so only on a proper requisition by the school board. A mere resolution of the board, communicated to the council was not sufficient. Furthermore, selection of the school site was entirely a matter to be determined by the board, and therefore the by-law could not, in its present terms, be upheld.

The procedure necessary for passing a valid by-law to raise money by sale of debentures in Ontario, is outlined in Re Garrett and Barrie.<sup>41</sup> The school board must requisition the council for funds to build the school. Council may approve or disapprove the requisition. If it approves, it must take further action to bring to realization what it has approved. If council disapproves, the board may require submission to the

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<sup>40</sup>(1909) 14 O.W.R. 734, 1 O.W.N. 74.

<sup>41</sup>(1918) 14 O.W.N. 194.



ratepayers, and if the majority of ratepayers voting on the question approve, council must raise the money. Alternatively, the school board may submit a revised requisition to council, and in that event council again has the power to approve or disapprove. Council cannot be restrained from approving a resubmission, for it obviously has power to do voluntarily what it might be compelled by a Court order to do.

When council is requested, subsequent to its disapproval of a requisition for a by-law, to submit the matter to a vote of the ratepayers, the question must not be submitted in such a way as to confuse. In Burlington Public School Board v. Burlington<sup>42</sup> council submitted the school board's request for a debenture by-law to the electors. The by-law was defeated, but because the vote had been extremely light, the board decided to submit another application for the same purpose, suggesting that the vote come at the time of the regular municipal elections to insure a better representation of opinion.

This time council proposed to submit alternative questions to the ratepayers. The board protested that this would prejudice getting a true vote on its question, but council refused to modify its stand and proceeded to prepare for the vote. The board applied for an injunction to restrain council in this action.

Council had proposed to submit the following questions:

- (1) Are you in favor of a school and site to cost \$30,000?
- (2) Are you in favor of a school on the old site to cost \$23,000?
- (3) Are you opposed to a new school?

The board objected to the last two of the questions on the following

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<sup>42</sup>(1918) 44 O.L.R. 561.



grounds:

- (1) It was the council's duty to submit the question as requested by the board;
- (2) Submission of three questions was contrary to the Act;
- (3) The last two questions were improper because they would mislead the electors and influence them to vote against the first question;
- (4) The questions were drawn so as to preclude any true expression of the ratepayers' wishes.

The Court, in granting the injunction, held that it was the board's duty to provide school accommodation. This was a matter for the sole judgment and discretion of the school board and not for the municipal council. The latter's only right in the matter was to require submission of the question to the ratepayers. It was the duty of council therefore, either to pass the by-law, or to submit it to the electors. If it chose the latter course, the question should be submitted as simply as possible. Council had no power to add other questions which might confuse and prevent a proper vote on the question involved in the board's application.

Once it has approved an application by a school board for such a by-law, the council has no power to rescind its action, or to repeal the by-law passed as a result of such approval. This was held in the West Missouri case and was approved in Re Potter and Burlington.<sup>43</sup>

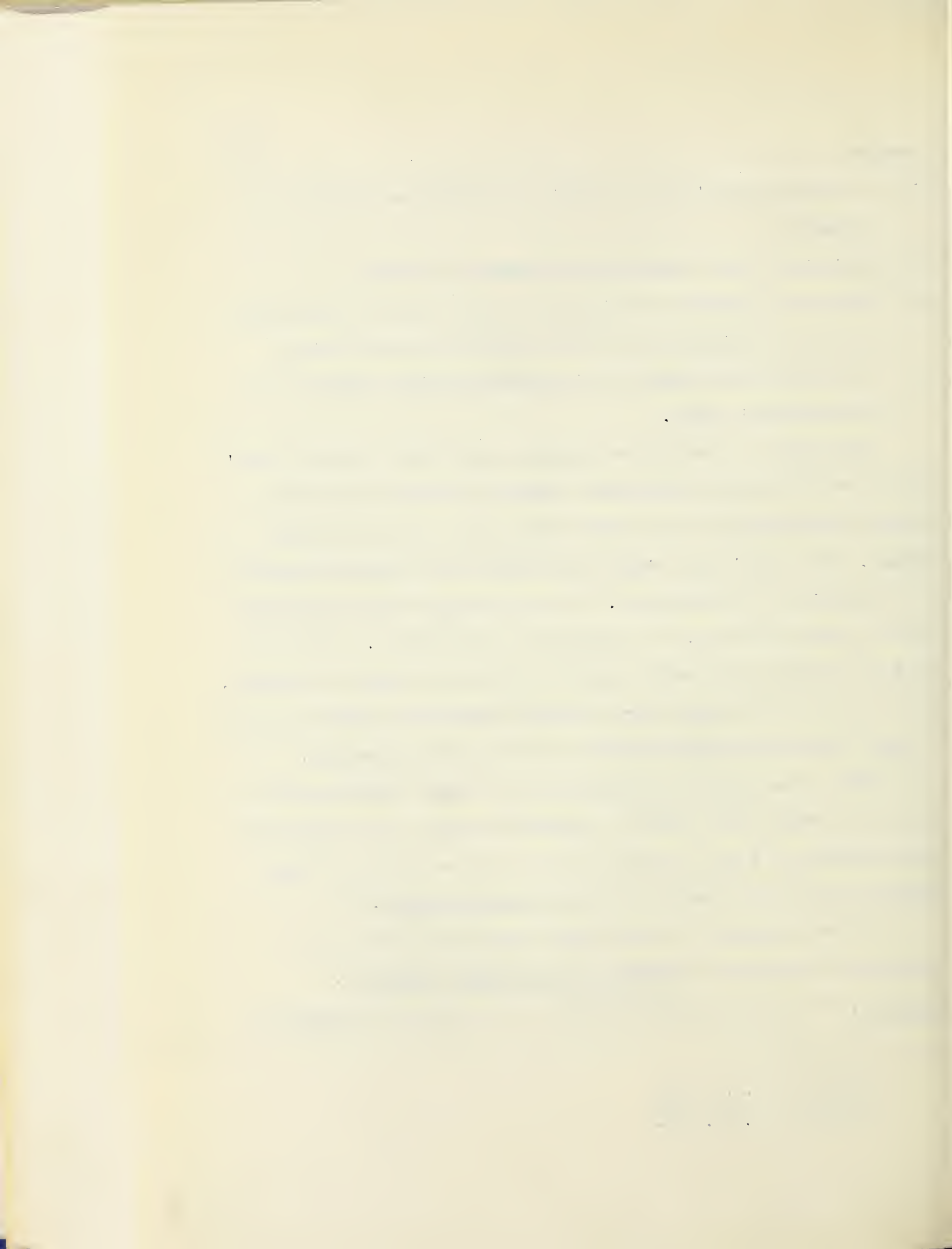
The whole question of board-council relations on by-laws for debentures is summarized in Harriston Public School District v. Harriston,<sup>44</sup> in which the Court held that to be eligible for mandamus to

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<sup>43</sup>(1921) 20 O.W.N. 177.

<sup>44</sup>(1921) 20 O.W.N. 656.





compel council to pass a by-law for debentures, a school board must show (1) that it had made a proper application to the council for the necessary by-law; (2) that the council had refused the application; (3) that the board had requested that the question be submitted to the ratepayers; and (4) that the assent of the ratepayers had been obtained.

#### Arbitration of Disputes on Requisitions

One other question remains to be considered. What is the position of the school board when the pertinent statutes provide for arbitration or submission to outside bodies in cases of dispute over requisitions? The question was answered in McLeod v. Salmon Arm School Trustees.<sup>45</sup> In this case the annual requisition of the board of the school district of Salmon Arm, British Columbia, was contested by the contributing municipalities. The dispute was submitted to arbitration from which, by statute, there was no appeal. The arbitration board cut some \$80,000 from the requisition. The school board attempted to negotiate for supplementary contributions from the municipalities, contending that it could not operate the schools with the amount approved by the arbitration board. One of the municipalities refused to participate. In subsequent litigation it was held by the Court that the board was bound by the arbitration award and had no right to request further contributions. Its only recourse, in the event that it could not operate with the funds allowed, was to resign and turn the responsibility for educating the children back to the province.

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<sup>45</sup> 4 W.W.R. 385, (1952) 2 D.L.R. 562. For complete discussion of the case see Chapter VI, *infra*.



Another British Columbia case deals with the method of constituting the arbitration board,<sup>46</sup> in that province. Kelowna district was a large municipal school district embracing the city of Kelowna, the municipal district of Glenmore, the municipal district of Peachland and fourteen rural attendance areas. In 1952 when the board submitted its estimates, the municipalities of Kelowna and Glenmore objected and demanded arbitration. These two municipalities appointed an arbitrator, the school board appointed another and the two arbitrators chose the third. At the hearing, the award cut the requisition from \$779,710 to \$730,210.

During the hearings the board chairman objected to the constitution of the arbitration board in that the representative of the municipalities had not been chosen by all the municipal groups. The municipalities countered that since the other municipalities had not disputed the requisition, they had no interest in the arbitration and therefore no right to participate in the selection of the municipal representative on the arbitration board.

The Court which decided the question agreed with the reasoning of the municipalities. The apparent intent of the legislature had been to include only those who were directly involved in the dispute. It is only the body or bodies which give notice that are parties to the submission. Therefore the arbitration board was not improperly constituted because a body or bodies which had not rejected the estimates and given notice had not participated in the appointment of arbitrators.

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<sup>46</sup>Re Kelowna and School District No. 23. (1952) 6 W.W.R. 520.



## IV. Summary

The details of legislation differ from province to province and therefore the details of school-municipal relations differ. However, the school board and municipal council are both corporate bodies, and the Courts have held that each is supreme within its own jurisdiction. Each is created by statute and therefore each is limited to the powers that the statute confers upon it. Neither one has authority beyond what the statute confers, to supervise or control the functioning of the other, though in some provinces, the two have been directed to work closely together as in Ontario in matters of raising money by debenture for school purposes.

In the area of school finance, which is the area of greatest friction between municipalities and school boards, the Courts have held that the municipality is merely a tax gathering agency for the school board. Its powers do not extend to control of the amount or the purpose of school expenditures. Its powers are ministerial and ancillary; that is to say, to be exercised only on demand and to be carried out without question, provided only that the school board requisitions for purposes within the ambit of its own authority.

The Courts have emphasized that school taxes or school requisitions, for current purposes or realized from the sale of debentures, are in no sense municipal moneys. They are contributed by the school supporters for school purposes. The municipality has no rightful claim on them especially when they are contributed by constituents who may be different from those of the municipality, by reason of the existence of





separate schools. The fact that school moneys are collected by the municipalities at the same time as municipal taxes, should not alter this fact. The legislature, in its wisdom, has assigned the method of tax collection merely as a measure to insure economy and efficiency and to avoid the confusion which would result if all local agencies with the power to spend public money were to assess property, strike their own rates and levy and collect their own taxes. Although they do not collect their own rates, school boards are as much responsible for school taxes as are municipal councils for municipal rates. If boards requisition too much, and expend money unwisely, it is for their constituents to exercise their power of sanction at the polls. Municipal authorities have neither the power nor the right to do so.

The concern of the Courts has been to determine first the extent of authority granted by the legislature to each of the local corporations. Then their concern has been to insure that each operates strictly within the limits of the authority granted to it. The Courts do not interfere in internal or discretionary matters of either corporation, however unwisely these matters may be conducted; but they are vigilant to prevent the encroachment of one authority upon the territory of the other. Where the duty is imposed on municipal councils to perform certain functions for school boards, the Courts enforce the performance of the duty when the board has complied with the statutory formalities necessary to cause the duties to be carried out.

On occasion the Courts have called upon disputing boards and



councils to work in harmony with each other. Possibly much of the friction that occurs is the result of misconception of the powers and duties of the other. Examination of the cases discussed in this chapter should help to dissipate some of such misconceptions.



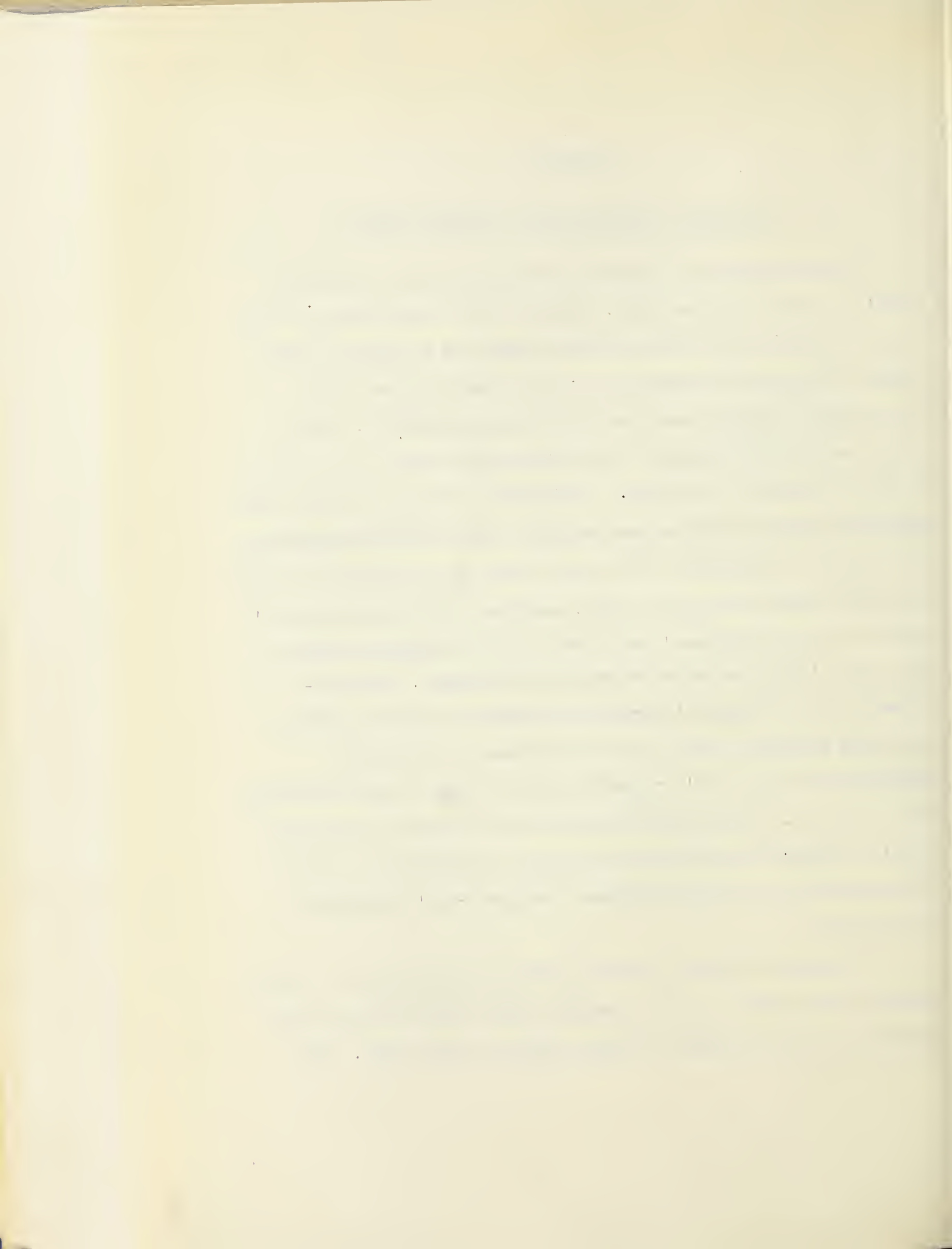
## CHAPTER V

### ADDITIONAL CONSIDERATIONS IN SCHOOL FINANCE

Matters relating to finances pervade the whole of the school board's functions and operations. Finance is the central issue in the board's relations with other government bodies, it is often the chief concern in contractual matters, and it is of prime concern in the services that a school board provides or wishes to provide. Consequently many of the aspects of school finance have been and are treated in other chapters of this study. Considerable attention was given this question in Chapter IV where such matters as school board requisitions, the respective obligations of the school board and the municipal council, municipal control over school boards, the status of the previous year's deficit in the current year's requisition and the surpluses resulting from school levies and debenture sales were discussed. Some consideration was also given to procedures required of school boards in requesting debenture issues, and of the effects of arbitration procedures upon the board's requisition when a dispute arises regarding the requisition. Such financial matters as are related to the school board's contractual activities are discussed in Chapter IX, in which the arrangement for necessary finances, and the board's obligations are considered.

It remains, therefore, for the purpose of this chapter, to bring together other aspects related to school finance which it has not been feasible to treat adequately in other sections of this study. Thus,





in this chapter there are additional considerations of school board requisitions on municipal governments, and further examination of school borrowing. One section, dealing with matters of fixed assessments and tax exemptions, though perhaps not of direct concern to school boards, especially where they are requisitioning authorities rather than taxing authorities, is nevertheless of interest and serves to clarify somewhat more fully the nature of school taxes and therefore the relation between school boards and municipal governments.

Again this chapter is necessarily delimited. Only those further aspects of school finance which have been in dispute and therefore have come before the Courts are considered. Because school boards in most provinces have the power to requisition on municipal governments rather than to assess, levy and collect their own taxes, cases involving these topics are of historical interest primarily and are not treated here.

## I. Further Aspects of School Requisitions

### Government Grants to Municipalities in Lieu of Taxes

Federal and provincial governments may arrange with municipalities to provide grants in lieu of municipal taxation on crown property within the municipality. Such arrangements are particularly appropriate in capital cities where senior governments have extensive holdings and where municipal and school services occasioned by such holdings may entail large local expenditures. The question may therefore arise: does, or should, the school board share in such grants? It was considered in Ottawa Public School Board v. Ottawa.<sup>1</sup>

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<sup>1</sup>(1953) O.R. 122, (1953) 1 D.L.R. 692, affirming (1952) O.W.N. 585.



In 1950 the Federal Government passed an order-in-council authorizing the Minister of Finance to make payments to municipalities in lieu of local taxes on government property. The City of Ottawa applied for and received \$962,392 under the order. The public school board, though it had previously made its requisition on the city council and had received the whole of it, applied to the city for the sum of \$183,720 which it claimed as its portion of the government's grant. The city council refused the request and the board petitioned for a Court order to compel the city to pay over the above amount. Both the Trial Court and the Appeal Court denied the board's petition. It was held that the board had made its requisition, had received the full amount, and therefore was not entitled to a further sum, since the city had already fulfilled its obligation to the school board.

The case has a number of interesting aspects. Evidently, when a school board is a requisitioning authority only, it cannot direct the levying authority how and from where it shall procure the money to fill its requisition. This conclusion is in agreement with the generalization drawn in Chapter IV that neither the school board nor the municipal council may invade the jurisdiction of the other. The school board has the right to requisition, and if the requisition is in good faith and for the legitimate purposes of the school board, the municipal council has no discretion in whether or not to provide the money. It follows that the school board's discretion ends with the submission of its estimates. The council may exercise its statutory powers and discretion in raising the money and the board has no right to interfere. When the money has been paid over to the school board, the council's obligation is discharged. It is conceivable, however, that in the situation where the board levies





and collect its own taxes, it would be entitled to a share of such grants made to the municipality by the senior government.

#### Errors in Requisitions and Levies

In the event of an error in interpreting a school board's requisition, which may result in inequitable taxation, a school board may apply to the municipal council to have the error corrected. This was held in Re Benmiller Consolidated School Trustees v. Colborne.<sup>2</sup> In this Ontario situation, three rural districts had been consolidated on the agreement that all costs of operating the new district would be levied on an equalized basis over the whole district. The board's estimate of \$3,600 for the year 1921 was submitted to the township council which levied \$1,200 on each of the former school districts, rather than \$3,600 on the whole area. As a result, rates in the component districts differed, and some properties were required to bear more than their fair share of the total cost. The board urged the council to rectify the error and equalize the burden. Council refused to accede to the request and the board applied for mandamus to compel it to do so. Mandamus was granted, and the onus for making the necessary adjustments placed on the council because it had been wrong in refusing to make them on the request of the board.

A somewhat different consideration arises when property belonging in one school district is wrongfully assessed and taxes paid to another district. Such a situation may arise where two or more districts lie partly or wholly within the boundaries of a single taxing authority, and school district boundaries are not clearly defined. The legal

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<sup>2</sup>(1923) 24 O.W.N. 17.





consequences are outlined in the Saskatchewan case of Epp School District v. Rural Municipality of Park.<sup>3</sup>

Two school districts, Epp and Finlayson, lay within the municipality. Two grain elevators, actually in Finlayson district, were thought by the municipal secretary-treasurer to be in Epp district and taxes for the period 1924 to 1931, amounting to \$738.75, were levied against these elevators and paid to Epp School District. Upon discovery of the error, the two school boards attempted to reach a settlement but were unable to do so. Thereupon, the Minister of Municipal Affairs ordered the municipality to pay Finlayson district \$350 which it had to the credit of Epp district and to levy \$97.19 per year for the years 1935 to 1938 on Epp district to be paid to Finlayson district. Epp district contended that this order was illegal, and that the School Assessment Act<sup>4</sup> providing for transfer of funds wrongfully levied was not retrospective. The Trial Court agreed, but on appeal it was held that it was possible to go back to years prior to the one in which the amendment to the Act became law.

Thus, as shown in these two cases, the Courts are prepared to step in to insure that ratepayers are not taxed unjustly. Errors for which there are no curative provisions in the statute may be rectified on the principles of equity. When corrected by statute, such provisions may be considered to act retrospectively, though this will depend upon the language of the pertinent sections.

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<sup>3</sup>(1936) 2 W.W.R. 331.

<sup>4</sup>R.S.S. 1930, c. 133, s. 70, 1934-35 amendment, c. 51.



Sufficiency of Requisitions

That the municipal council may not interfere with the board's requisition, when the statutes give the board power to make such a requisition, was established in Chapter IV. However, the statute usually has something to say about the form in which a requisition must be submitted. What is a sufficient requisition, meeting the necessary requirements and upon which the council must act?

A number of early Ontario cases treated the question. In Re School Trustees of Sandwich and Sandwich<sup>5</sup> it was held that a requisition must be more than a mere resolution by the board to apply to the municipal council to raise a certain sum of money. Speaking for the Court, Draper, C.J., said:

We think that preparing an estimate means something more than resolving to make an application to the town council for a lump sum of money for the erection of school premises. There should be something to shew that proper inquiries and calculations have been made, from which they conclude that the sum named would be adequate for the purposes intended; something, in short, which has led them to the conclusion that the sum asked for is necessary and will be sufficient for the object. Without this we do not see how they can be said to have prepared an estimate to lay before the council.<sup>6</sup>

In Re School Trustees of Mount Forest and Mount Forest<sup>7</sup> it was held that a request made by the chairman and secretary-treasurer in person for a lump sum of money to be paid over in three weeks' time, was not a proper requisition, nor a specific demand on the council.

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<sup>5</sup>(1864) 23 U.C.Q.B. 639.

<sup>6</sup>Ibid., at p. 643.

<sup>7</sup>(1869) 29 U.C.Q.B. 422.



The Court ruled that it was defective in that it did not specify the purposes of the requisition, as contemplated by the statutory provisions, nor was it reasonable in its stipulation of the time allowed for collection. Unless boards adopted a reasonable attitude, and followed the legislative provisions, they could not expect the Courts to aid them in compelling performance of their demands.

As was held in Re School Trustees of South Fredericksburg and South Fredericksburg,<sup>8</sup> a board's requisition must be addressed to the proper official if it is to have effect. In this case, the requisition for \$460 was delivered by the small son of one of the trustees to a municipal councillor. The boy had not identified himself, nor given instruction that the document was to be presented to the council. The Court held that this could not be considered a proper requisition.

However, depending on the language of the statute, a requisition may be considered sufficient even if it does not itemize in detail the estimates of the board. In Re Port Rowan High School Trustees and Walshingham<sup>9</sup> it was held that because the Act regulating the operation of high schools was different from that which regulated common schools, a requisition for "expenses of conducting the high school" or for "current expenses of conducting the high school" was within the meaning of "maintenance and school accommodation" as required by the Act. Even though the board had not used its full name, the municipal council was held to have understood clearly from whom the demand came. Although

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<sup>8</sup>(1876) 37 U.C.Q.B. 534.

<sup>9</sup>(1873) 23 U.C.C.P. 11.





the Court deplored the utterly careless manner in which the whole matter had been conducted, the requisition was held to be sufficient in law.

The question of deficits accruing in the normal operation of schools was discussed in Chapter IV, where it was established that these may be properly included in the current requisition. When deficits arise out of capital expenditure for which there has been no debenture borrowing, however, the material facts are somewhat different. Such a situation was treated in the recent Ontario case of Cambridge and Castleman District High School Board v. Township of Cambridge.<sup>10</sup>

This was an application by the board for mandamus to compel the township to levy and collect its total current requisition for school purposes. The board's estimates, in proper form and submitted at the proper time, included an item for \$6,215.97 which was a deficit from the previous year. The council maintained that inclusion of this deficit was ultra vires the board because it was for capital outlay which had not been approved by the Ontario Municipal Board, and could not therefore be included legally in the estimates.

The statute required that capital expenditure out of current revenue for amounts greater than \$5,000 must be approved by the Ontario Municipal Board. Approval had been granted, but not until after the beginning of the hearings on the application for mandamus.

The Court held that although the statute requires approval, it does not say when the approval must be given, except that it must be

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<sup>10</sup>(1954) O.W.N. 283.



given before the municipality can be required to collect the money.

Once the approval had been given, there was no longer any question about whether the council must raise the money. The township appealed from this ruling.

On the appeal, the Court affirmed the previous judgment. Sec. 51(1) of The High Schools Act<sup>11</sup> provided that:

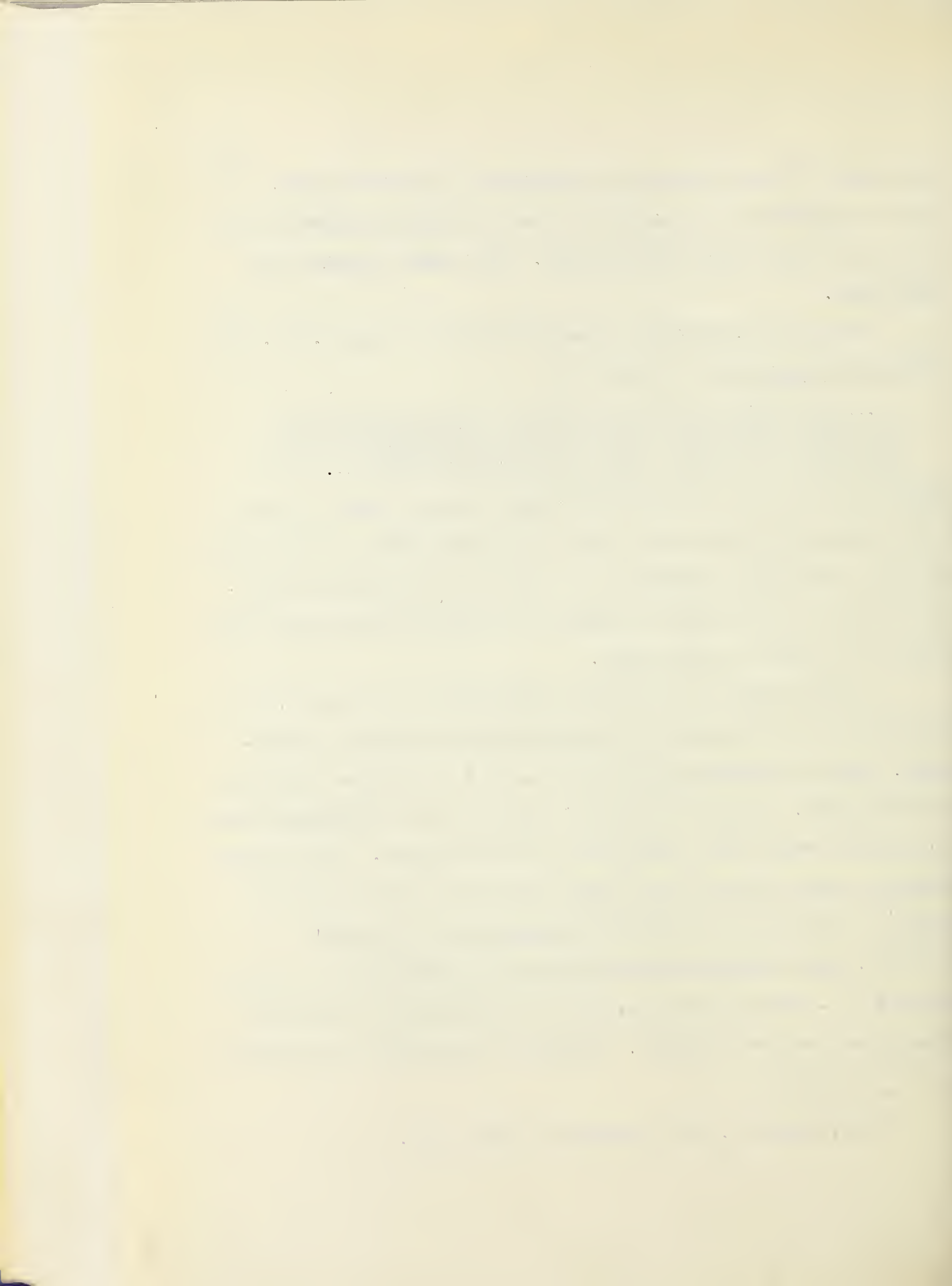
...the council of any municipality or county may raise by assessment, in addition to any sum which it is required to raise by this Act, such further sums as it may deem expedient for the maintenance or permanent improvement of the high school...

Therefore, the council was not bound to raise the money before approval of the Ontario Municipal Board. Before such authorization, it could raise the money voluntarily; afterward it was bound to do so upon requisition. In any event, it was the duty of council to provide up to the \$5,000 limit which did not require authorization.

The cases cited in this section indicate that a requisition, to be sufficient in law, must be in accordance with the statutory requirements. When such conditions have been met, the Courts enforce compliance with the demand. However, as the Court pointed out in the Port Rowan case, such matters should not be conducted in a careless manner. Good business procedure demands that more than minimum standards be met in conducting matters as important as preparation and submission of the board's estimates. Such matters should be conducted in an atmosphere of courtesy and good will. When that is done, there is less likelihood of misunderstanding and needless litigation. Submission of questions to the Courts

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<sup>11</sup> R.S.O. 1950, c. 165, as amended by 1951, c. 32.



could and should be restricted to those matters in which a real disagreement in interpretation of statute exists.

#### Time for Submission of Requisitions

Although boards may have the right to requisition, this is not an unlimited right. Rather it is limited by the statutory provisions related to it. Thus a board may be required to submit its estimates before a stipulated date. Failing to observe the regulations may result in dire consequences for which the board may be without remedy.

Thus in the New Brunswick case, Ex. Parte Carvill,<sup>12</sup> it was held that when the school requisition was made approximately one month after the date on which the city had levied for municipal purposes, the city could not make a second levy for school purposes. The Court maintained that without the school requisition, it was not possible for the council to regulate the financial affairs of the city, and thereby prevent levying more than a fair rate for the year. Furthermore, the Act required a general assessment before April 1st of the current year, and after that date, the council had no authority to make an independent school assessment.

An Ontario Court<sup>13</sup> handed down a similar ruling. In this case a school board, not having completed its estimates by the required date, submitted a provisional requisition and two supplementary demands. The

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<sup>12</sup>(1873) 14 N.B.R. 222.

<sup>13</sup>Re Beaverton Public School Trustees and Thora (1932) O.R. 663, 4 D.L.R. 458.





Court held that the provisions of The Public Schools Act<sup>14</sup> must be followed. One estimate, not a partial estimate or two or more estimates, were to be submitted to the council. When submitted, it became council's duty to levy and collect the money required. Until the complete estimate is submitted, a council is unable to determine the total amount to levy, and it is not entitled to levy any amounts for school purposes merely in anticipation of the board's request. Nor can the board request of the council any moneys not included in the annual requisition.

The consequences were clearly stated by Mulock, C.J.O.:

Inasmuch as the council is not entitled to include in the rate for the year any sums for school purposes until the school board shall have submitted to it an estimate covering all the expenses for the year, it is obvious that inasmuch as here no such estimate was submitted to the council before those requisitions were made upon it, the school board was not entitled to the moneys so requisitioned...<sup>15</sup>

It is evident from these cases, that the school board must exercise its right of requisition on the municipal council in accordance with the provisions of statute. The board cannot compel the council to pay over moneys without first submitting its estimates, which are required by the council as authority to levy taxes for school purposes. Where a council may, by statute, levy only once per year, the board may present only one requisition for the whole year's operation, and that demand must be made on or before the date required by law. If the proper date is not observed, a council's rating by-law might be attacked and set

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<sup>14</sup>R.S.O. 1927, c. 323, ss. 55, 57(1), 88(p).

<sup>15</sup>(1932) O.R. 663, at p. 666.



aside. Therefore, it is imperative that the provisions be carefully followed.

It is to be inferred that though council may not be compelled to pay over money to the board in anticipation of a current requisition, the board and council may agree upon such payment without formal demand, if the council has the money available. Such an arrangement would be reasonable where prepayment of taxes is encouraged, and would help to reduce short-term borrowing for current school expenditures.

#### Requisitions Before Need is Actually Established

It has been held that the board has no right to demand, and council no right to levy for a school whose establishment is merely contemplated. Thus in Sharp v. Peel<sup>16</sup> the plaintiff applied to quash a municipal by-law providing for \$2,000 for "the future high school which may be formed in the northwest portion of the county," on the ground that it was not competent for the council to raise money for a high school not in existence and whose boundaries had not been established at the time of the by-law. The Court granted the application, for the statutes did not provide the power to raise money for high school purposes in districts which had not been established and therefore had no existence.

Similarly, in Ex Parte Maher<sup>17</sup> a New Brunswick Court ruled that the legislature had never intended that school boards should be empowered

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<sup>16</sup>(1876) 40 U.C.Q.B. 71.

<sup>17</sup>(1873) 14 N.B.R. 251.



to requisition for interest on debentures in advance of their issue and which might never be issued. Only when the debt had been legally contracted under the proper authority could such a requisition be made. As Ritchie, J., said:

Until the debentures are issued and a debt is created, how can an assessment be made for interest? We are asked to read the word "issued" as if the Legislature had said "to be issued." But what right have we to depart from the plain language of the Act, and give a construction to the words used at variance with their natural meaning, and also, as we think opposed to common sense, for it cannot be supposed that the Legislature ever intended to vest a power in the Trustees to ask an assessment to raise interest on debentures in prospectu, and which perhaps might never be issued.<sup>18</sup>

The rulings in these two cases are entirely reasonable. Unless the legislatures specifically provide for such a power, trustees should not requisition for extraordinary obligations which they might contract in the future. To permit them to do so would be to remove effective control over school spending. Under such conditions, a school board might be tempted to requisition in bad faith for such purposes, intending to make expenditures which were unauthorized and for which legitimate requisitions would be denied.

## II. School Borrowing

### Debentures as Evidence of a District's Establishment

The legal erection of a new school district requires that statutory procedures be followed carefully. However, it may happen that such procedures are not strictly followed, either through ignorance or carelessness. If irregularities are not challenged, proceedings may go

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<sup>18</sup> Ibid., at p. 253.





to the point of issuing debentures for purchase of site and construction of a school house. The position of a school board in such circumstances is discussed in the cases which follow.

The Manitoba case of Molison v. Woodlands<sup>19</sup> was determined on the basis of Sec. 219(g) of The Public Schools Act,<sup>20</sup> which read:

Such signature (of the provincial secretary) shall be conclusive evidence that such a corporation has been legally formed and that all the formalities in respect to the said loan and the issue of such debentures have been complied with and of the correctness of the statement or endorsement thereon, and the legality of such debenture shall be thereby conclusively established and its validity shall not be questionable by any Court in this province, but the same shall to the extent of the revenues of the school district issuing the same, be a good and indefeasible security in the hands of any bona fide holder thereof.

The school district in this case, a consolidation of two former districts, was set up in 1913, by procedures not strictly in accordance with the requirements of the Act. However, no ratepayers challenged the proceedings, and assent was given by the Department of Education. Trustees were elected, and pursuant to a resolution of a ratepayers' meeting, they selected and purchased a site. The trustees also determined to borrow \$9,000 by issuing debentures, to pay for the site and to erect and furnish a school house. Accordingly, the debentures were issued, signed by the Provincial Secretary as required, and sold by the board. A contract was let and construction well under way before three ratepayers initiated this action to have a declaration that the consolidation of the districts was null and void and therefore not binding on the ratepayers.

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<sup>19</sup>(1915) 7 W.W.R. 1315, 30 W.L.R. 64, 21 D.L.R. 19 affirmed 9 W.W.R. 183, 32 W.L.R. 452, 25 Man. R. 634, 25 D.L.R. 30.

<sup>20</sup>R.S.M. 1913, c. 165.



The Court held that though there had been irregularities in the formation of the district, the action came too late to be considered. Had their objections come earlier, plaintiffs might well have succeeded, but the provisions of the above section were clear. The intention of the legislature had been that once debentures were properly issued, they should be a proper security in the hands of an innocent purchaser. In effect, plaintiffs were asking for a declaration that the new district should exist only for the payment of the debt incurred by debenture sales. This would mean that ratepayers would have not only the burden of operating the old school districts, but also the retirement of the new debt from which they would receive no benefit. Said Mathers, C.J.K.B.:

Be that as it may, the whole spirit and intention of The Public Schools Act is in my opinion opposed to the creation and maintenance of a school district for the purpose of paying debentures only and not for the purpose of discharging its legitimate functions of conducting a public school. When the organization of the school district has reached the stage of issuing debentures pursuant to a by-law sanctioned by the ratepayers, it was manifestly the intention of the Legislature that its legal existence should not thereafter be questioned because of an antecedent informality.<sup>21</sup>

An Alberta case, Oyen School District v. Boyle,<sup>22</sup> proceeded on a similar provision of statute, though organization was not permitted to reach the stage of debenture issue. Sec. 130 of The School Ordinance<sup>23</sup> stated that:

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<sup>21</sup>(1915) 7 W.W.R. 1315, at p. 1321.

<sup>22</sup>(1917) 2 W.W.R. 313, 11 Alta. L.R. 280, 34 D.L.R. 78, affirming (1917) 1 W.W.R. 1258.

<sup>23</sup>C.O.N.W.T. 1898, c. 75, 1916 amendment, c. 9.



The Minister shall thereupon if satisfied that the requirements of this Ordinance have been substantially complied with and if the authority to make the loan has not been withdrawn, register and countersign the debenture, and such countersigning by the Minister shall be conclusive evidence that the district has been legally constituted and that all the formalities in respect to such a loan and the issue of such debenture shall be thereby conclusively established and its validity shall not be questionable by any Court in the Province of Alberta but the same shall to the extent of the revenues of the district issuing the same be of good and indefeasible security in the hands of any bona fide holder thereof.

Trustees of the school district had procured a site which had not been approved by the Minister as required by the Ordinance, and had let a contract for erection of a school building also without the required authorization from the Minister. They then attempted to obtain permission for a debenture issue, but the Minister refused to countersign the debenture because of the preceding irregularities engaged in by the board. Thereupon the trustees applied for a Court order to compel the Minister to act as requested.

In refusing to grant the order, the Court pointed out that the Minister could not be compelled to authorize expenditure of money for unauthorized purposes. Rather, he must take steps to protect the rights of all parties. Had the trustees followed the provisions of the Ordinance, receiving authorization at each stage of the district's organization, the Minister could have been compelled to give his approval. Not having done so, the board was powerless to enforce compliance with its wishes, even though it had proceeded to a point where it would be embarrassed by retreating and initiating correct measures.

From consideration of these cases it becomes clear why statutory procedures regarding erection of school districts or alteration of their





status must be carefully observed. The rights of numerous parties, including ratepayers, contractors, purchasers of debentures, as well as the trustees, must be safeguarded. Following such procedures may involve irksome delays, but disregarding them may involve infringement of rights with resultant costly litigation, ill will and further delay.

#### Debenture Circulated Without the Board's Authority

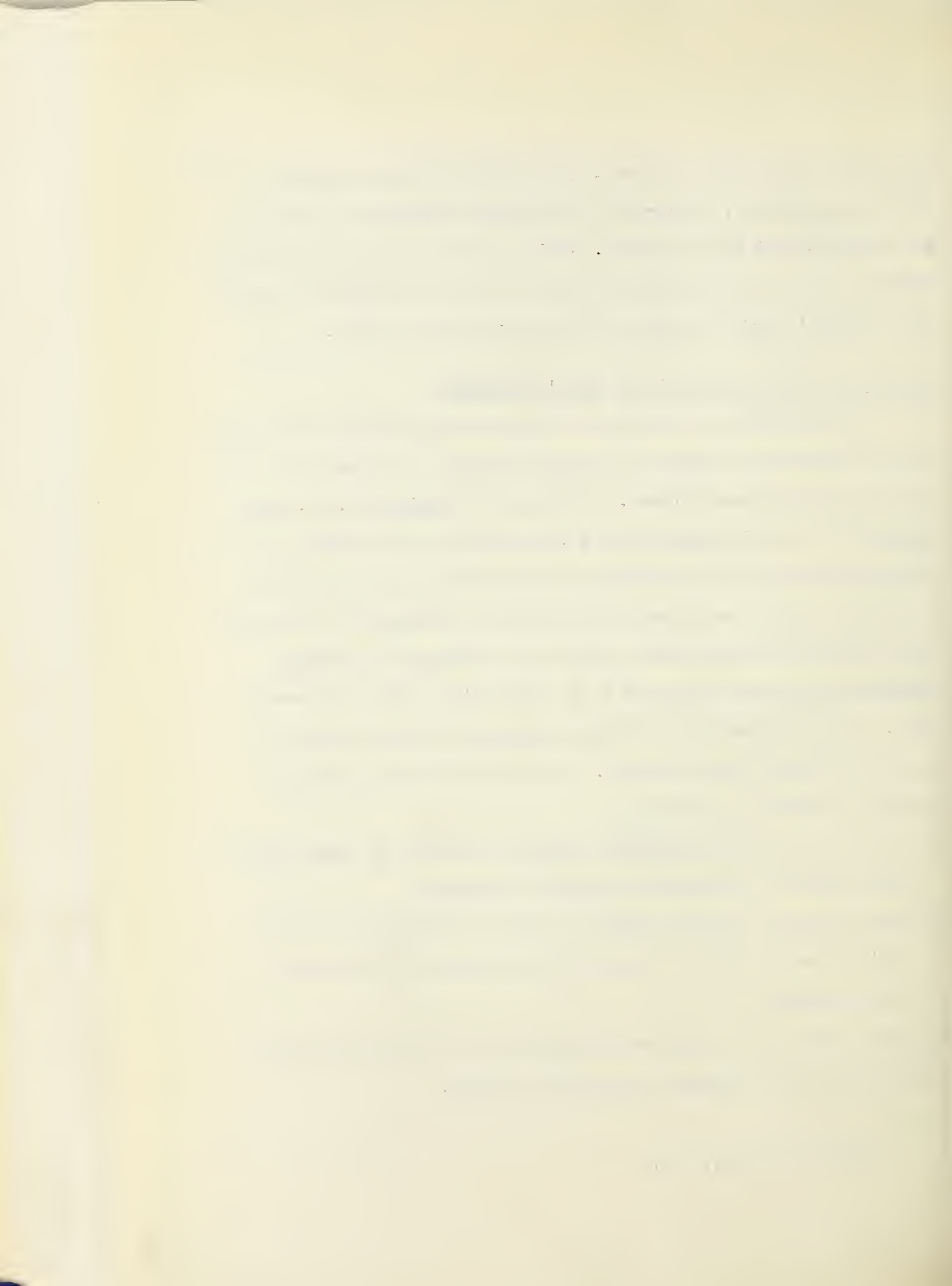
The importance of conducting all school board business with care, but particularly the handling of unsold debentures, is emphasized by the ruling of a New Brunswick Court. In the case of Robinson v. St. John Trustees,<sup>24</sup> a school debenture for \$2,000, payable to the bearer and signed and sealed by the chairman and secretary-treasurer, was allowed to get into circulation without the authority or knowledge of the board, and without its receiving value for it. The debenture was finally purchased by plaintiff, who took it in good faith, paying full market value. When he presented two interest coupons, the board refused to pay and he brought suit to recover. In the trial the judge charged the jury to answer two questions:

- (1) Did the bond come to plaintiff innocently through the carelessness and neglect of the trustees and their officers?
- (2) Were the board and their officers guilty of negligence to such an extent that it would be inequitable and unjust to find against the plaintiff?

The jury answered both questions affirmatively and the Court found for the plaintiff. This judgment was upheld on appeal.

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<sup>24</sup>(1898) 34 N.B.R. 503.



By their carelessness and negligent attention to their duties, the trustees had imposed a major debt upon the ratepayers, and it is to be implied, exposed themselves to severe censure, if not legal action. School board business, being public business, must not be conducted carelessly or negligently. Such a public trust demands full and meticulous attention, not only to statutory provisions, but to the protection of the public interest.

### Unauthorized Borrowing

According to Halsbury's Laws of England

A non-trading corporation has no implied powers to borrow money; and the question as to its powers in this connection must be determined by reference to its constitution...The borrowing powers of a corporation may be restricted by express terms or by necessary implication in its constitution. In such a case a person who lends in excess of the authorized amount does so at his own risk.<sup>25</sup>

Provincial school statutes, the constitutions of school corporations, lay down the borrowing powers of school boards. A number of legal cases discuss the consequences of unauthorized borrowing.

A leading case is that of Quinlan v. St. John School Trustees, cited in Chapter II of this study. In this case it was held that money borrowed by the secretary-treasurer on the personal note of the trustees to pay the legitimate debts of the school district, was not actual borrowing by the board, but merely a transfer of the creditors of the district and therefore payable by the board. Such borrowing, though unauthorized for the school corporation under the existing statute,

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<sup>25</sup>8 Halsbury, 2nd ed., pp. 77-78, quoted in (1955)  
2 D.L.R. 122, at p. 136.



must, in equity, be repaid for it did not increase or decrease the board's obligations.

A similar ruling was given in McNeil v. Victoria School Trustees.<sup>26</sup> In this case, plaintiff who was a trustee, at the urging of other members of the board, lent money with which to pay the teacher's salary. In his action to recover the money he had lent, the Trial Court found for the defendant board on the basis that the board was not authorized by statute to borrow for such a purpose, and furthermore, the loan had not been approved by the ratepayers. On appeal, however, it was held that such borrowing as this did not increase the liabilities of the corporation, and therefore did not require special authority.

In other words, the definition of borrowing, as the term is used in School Acts, was not interpreted in these cases as extending to loans which were applied to the current expenditures of the school board. Such liabilities as payment of the teacher's salary must be discharged and if the board borrows to meet the payment, its action may be considered as a transfer of creditors rather than unauthorized borrowing. For its current operation, for which provision has been made through its requisition, the board may be entitled to borrow without special authorization. For all other purposes, the statutory procedures should be followed.

The position of the lender when the borrowing does not fall into the class of the above cases is illustrated in the New Brunswick case of Provincial Bank v. School Trustees of District No. 2.<sup>27</sup> By the provisions

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<sup>26</sup>(1900) N.S.R. 546 (Nova Scotia).

<sup>27</sup>35 M.P.R. 161, (1955) 2 D.L.R. 122.





of the Schools Act<sup>28</sup> the board was empowered to borrow for the purchase of lands and erection of buildings, among other things, upon the permission of the Department of Education and the authorization of the ratepayers. Such borrowing was to be done by debenture, and if the period of repayment was to be greater than seven years, it was necessary to obtain a special order from the Department. No provision of the Act gave trustees the right to borrow on their own initiative on a promissory note.

In 1948 the board, intending to take advantage of a forty per cent building grant from the government, decided to build a new school. Plans were approved by the Minister and \$10,000 was borrowed in the prescribed manner. A contract was signed for erection of a building at a cost of \$25,000 and work was begun. When the money was exhausted, the board, authorized by the ratepayers, applied for permission to borrow a further \$15,000 and permission was granted. However, the trustees were unable to sell the debentures and the secretary arranged to borrow \$10,000 from the bank, to be repaid when the government grant was paid.

Subsequently the secretary was persuaded to sign a cheque for that amount in favor of the contractor--although the board owed him considerably less--in anticipation of his completing the contract. Before completing construction, the contractor used up all the money, failed financially and filed bankruptcy. Thus, by statute the board had not been authorized to borrow from the bank; the contractor had expended the money and filed bankruptcy before he completed work to the value of the money he had received.

In the action by the bank to recover the money lent, the Trial

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<sup>28</sup>R.S.N.B. 1927, c. 52.



Court held that since the borrowing had been unauthorized, it could not be recovered as against the corporation. However, because the board had used some of the money to pay what it owed to the contractor, the bank was entitled to recover that amount. The figure was set at \$5,000 plus interest at five per cent. The bank appealed, but the Appeal Court agreed with the reasoning of the Court below. It did differ, however, on the amount which the bank should be allowed to recover. This was set at \$7,500, but no interest was allowed because the borrowing had been ultra vires the board in the first instance, making the promissory note and its terms void.

Thus, in such a case, when borrowing is ultra vires the statutory corporation, the lender provides money at his own risk. He may recover only to the extent that his money has been used to pay the legitimate debts of the corporation, but is without remedy for the remainder. This general principle runs through all the cases cited in this section.

#### Circumvention of Borrowing by Current Levy

On occasion, perhaps because of pressing need for increased school accommodation, but anticipating an adverse vote on a borrowing by-law, a school board may attempt to circumvent the need for borrowing by including large sums for capital purposes in its annual requisition. Two cases have been cited in previous chapters.<sup>29</sup> In each case, the Court refused to permit such a procedure. This is operation in bad faith, attempting to evade the clear provisions of the statutes and therefore beyond the

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<sup>29</sup> See Phillips v. Ross, p. 48, and London Board of Education v. London, p. 136, supra.



powers of the board.

### III. The Nature of School Taxes and the Effects of Fixed Assessments or Tax Agreements

Although under a system whereby school boards requisition on municipal governments for finances, the matter of municipal tax agreements with industrial firms does not affect school boards directly, such agreements do have implications for school finance. A number of cases arising out of such agreements are examined in this section. Frequently they arise because of attempts by the municipal corporation to assess an industrial enterprise, which is party to a tax agreement, for school purposes. Although the municipality is bound to provide the total of the school requisition whether it is successful in its action or not, such agreements do place a greater burden of school support on property which is not exempted than would otherwise be the case. It might also be suggested that difficulties arising out of tax exemptions may be a further source of friction between school boards and municipal councils in that they are one additional factor in causing mill rates to rise higher and more rapidly than is desired. Such industry, though it may bring increased economic opportunity to a community, may demand municipal and school services which cost more than the industry returns to the community in taxes.

This also raises an interesting question which has not been resolved by the Courts, and which may in fact represent an inadequacy in school legislation. As was pointed out in Chapter IV, the Courts have





held that school boards and municipal councils are supreme, each within the ambit of its own authority. Each has its own constituency to which it is responsible, though the constituencies may overlap. However, when the board is a requisitioning body, it has no control over how money to meet its requisition is to be raised. Thus, a municipal council may make tax concessions to an industry, without the board's assent, whereby the industry pays less school tax than it otherwise would. This has the effect of increasing the school tax burden of the individual ratepayer by action of the municipal council rather than by action of the school board, and is, in effect, an invasion of the school board's legislative jurisdiction by the municipal council. The school board cannot be held responsible by its constituents for such an increase in the individual's school tax. Nor can the municipal council be held responsible by the school board's constituents. The whole matter is one which requires clarification, for it relates directly to the issue of the fiscal independence and fiscal responsibility of the school board, and also leaves unanswered the question of what recourse is open to the ratepayer.

In cases involving municipal tax agreements or concessions, the question usually facing the Courts is whether school taxes may be classed as municipal taxes. The answer varies according to whether a school board levies its own taxes or requisitions on the municipal council. In the latter case, school taxes are held to be municipal taxes whereas in the former it is held that municipalities have no power to restrict the taxing capacity of a school board.



C. P. R. v. Winnipeg<sup>30</sup>

The Winnipeg case is the leading authority in the situation where boards requisition for finances. The case is given in detail.

Facts in the Case. In its original plans the C.P.R. was to cross the Red River at Selkirk, Manitoba, some thirty miles north of Winnipeg. The city was anxious to have the main railway line pass through it, and was prepared to offer certain inducements to that end. An agreement was entered into and embodied in a city by-law in 1881. By the terms of the by-law, the city granted the railway company \$200,000 in debentures with interest, and agreed "to exempt the property now owned or hereafter to be owned by the said Railway Company for railway purposes within the City of Winnipeg from taxation forever...(property) shall be forever free and exempt from all municipal taxes, rates and levies and assessments of every nature and kind." Both parties carried out their part of the agreement, and when later the validity of the by-law was questioned, the legislature of Manitoba passed an Act validating it.

Question Before the Court. The City of Winnipeg subsequently attempted to assess the C.P.R. for school purposes. The question before the supreme Court of Canada was to define the extent of the exempting privileges created by the Act which validated the city by-law. Were school taxes included in the phrase "municipal taxes, rates and levies and assessments of every nature and kind"?

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<sup>30</sup>(1900) 30 S.C.R. 558, reversing 12 Man. R. 581.



The Judgment. At the outset, it was established that the whole by-law, including the tax exemption was valid. The action of the legislature had removed all possible doubt. Therefore the only question was whether the exemption included school taxes.

By statute,<sup>31</sup> at the time of the agreement, the school board of the city had no authority to levy and collect its own taxes. It was required to requisition on municipal authorities, who were under absolute obligation to comply with such a requisition. The Court found that literally interpreted, the phrase in question did include school taxes.<sup>32</sup> However, the further ground was given that the term municipal taxes included all taxes levied by the governing body of the municipality for the purposes of the municipality. Said Mr. Justice Sedgewick:

Taxes imposed for the support of schools in a municipality are taxes for the purposes of the municipality. Promotion of education in a community is as much a municipal purpose as promotion of health or any other objective having the welfare of the community in view. Many cities have statutory authority to impose taxes for the support of hospitals, or public libraries, gymnasiums and athletic associations of all kinds. Are these any more municipal purposes than education? There is not, in my view, any difference in principle between them.

...There is another view...I submit that any taxation by a municipal body for the purpose of raising money to relieve itself from a municipal obligation is taxation for a municipal purpose. The obligation of imposing this tax and of collecting it is one of the city's legislative burdens. Relief from that burden must therefore necessarily be a municipal purpose, and the moneys raised therefore a municipal tax.<sup>33</sup>

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<sup>31</sup>44 Vict. c. 44, s. 51.

<sup>32</sup>See p. 43, supra.

<sup>33</sup>30 S.C.R. 558, at p. 564.





The ruling in this case was followed in Stratford Public School Board v. Stratford,<sup>34</sup> in Moose Jaw Street Railway Co. v. City of Moose Jaw<sup>35</sup> and in Grand Trunk Pacific Railway v. Edmonton.<sup>36</sup> In each case the city had given a railway company certain tax concessions. Desiring at a later date to levy school taxes on a true assessment, councils were not permitted by the Courts to do so. Where school taxes are levied by the municipal council on the requisition of the school board, the Courts have held that school taxes fall into the general class of municipal taxes. Whether one agrees with it or not, this definition carries considerable judicial weight.

#### Other Cases Involving Tax Agreements

Where the municipality which grants a tax exemption is not coterminous with the school district which requisitions on it, this constitutes a material difference in fact from those of the Winnipeg case, and so does the judgment. Thus in Re Osmet and Indian Head<sup>37</sup> the school district extended beyond the boundaries of the town of Indian Head, Saskatchewan. For raising school taxes only, the area outside the town was considered part of the town municipality. Therefore, said the Court, if the town were allowed to exempt property from school taxes, then property outside the town would have to pay a greater portion than was equitable. If the municipality could exempt from

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<sup>34</sup>(1910) 17 O.W.R. 1029, 2 O.W.N. 449.

<sup>35</sup>(1915) 33 W.L.R. 320 (Sask.)

<sup>36</sup>(1918) 1 W.W.R. 943.

<sup>37</sup>(1907) 7 Terr. L.R. 462, 6 W.L.R. 114 (Sask.)



school taxes together with other taxes, it could exempt from school taxes alone and thereby throw the entire burden of school support on property outside the town. The owners of such property had had no voice in the creation of the exemption, and such an action would be most unjust.

Where statutory provisions prohibit exemption from school taxation, no real question exists, though it may be necessary for a Court to clarify the meaning of a statute or a tax agreement. Thus, in Re Ontario Power Company v. Stamford<sup>38</sup> it was held that though the city had fixed the assessment of the company at \$100,000 for a period of twenty years, The Public Schools Act<sup>39</sup> forbade exemption of any kind from school rates.

In similar Ontario cases it was held that while property could not be exempted from school rates, if a municipality had mistakenly done so, it could not collect taxes for years past. In Pringle v. Stratford<sup>40</sup> the Court issued a mandatory order on petition of a ratepayer, compelling the city to assess for school purposes, a furniture manufacturing company to which it had granted a tax concession. However, the order was not permitted to act retrospectively. The same ruling was given in London v. McCormick Manufacturing Company,<sup>41</sup> in which the city sued to recover school taxes which it had not collected for the years 1912 to 1923, being under the impression that a tax exemption included school taxes. The Court

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<sup>38</sup>(1914) 30 O.L.R. 378, 18 D.L.R. 64, affirmed 50 S.C.R. 188, 20 D.L.R. 261.

<sup>39</sup>1 Edw. VII, c. 39, s. 77.

<sup>40</sup>(1909) 20 O.L.R. 246.

<sup>41</sup>(1924) 26 O.W.N. 245.



held that though the company was liable for school taxes, the city could not collect such rates for the period in question.

A similar statutory prohibition against exemptions from school taxes was held to prevent the city of Brandon, Manitoba, from granting such a privilege to a convent.<sup>42</sup>

The effect on school rates of a tax agreement between a municipality and an industrial concern when school boards levy their own rates is clearly laid down in R. v. Madawaska School Trustees; Ex Parte Fraser Companies.<sup>43</sup> Trustees of the town of Edmundston, New Brunswick, were independent of the council. They levied and collected their own taxes, not having been taken over by the town as permitted by statute. The Fraser Companies, wishing to establish a pulp and paper mill in the town, applied to the legislature to have their assessment fixed for taxation purposes. An Act was passed permitting the town to set the assessment between \$55,000 and \$200,000, but the Act made no mention of school taxes. Subsequently the town and the company entered into an agreement fixing the assessment at \$100,000, which was ratified by the legislature. The school board, however, not being a party to the agreement, assessed the property at its full value, and the company appealed the assessment. Laying down the basic principle, Hazen, C.J., said:

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<sup>42</sup>Re Institute de Notre Dame des Missions v. Brandon (1932) 2 W.W.R. 557, 3 D.L.R. 712, 46 Man. R. 255.

<sup>43</sup>(1919) 46 N.B.R. 506, 49 D.L.R. 371, affirmed 60 S.C.R. 351, 56 D.L.R. 95.





It is laid down very clearly in the text-books and in the cases that have been decided on the question that taxation is the rule and exemption the exception. The intention to make an exception ought to be expressed in clear and unambiguous terms and it cannot be taken to have been intended when the language of the statute on which it depends is doubtful or uncertain. Taxation, it is said, is an act of sovereignty to be performed as far as it conveniently can be, with justice and equity to all, and exemptions, no matter how meritorious, are of grace and must be strictly construed.<sup>44</sup>

The Court held that exemptions granted by the legislature, if extended to include school rates as in this case, would violate the fundamental principles of the free school law founded on the idea that all property should bear an equitable share of the costs of education. In previous years, the legislature in passing exemption laws had carefully guarded schools from their provisions. To include school assessments in the exemption would work hardship on the schools. An industry bringing in an increase in population necessitated expanded school facilities. Exempting the industry would throw an undue burden on other property in the community and lead to impaired efficiency in the schools. Furthermore, good schools were held to be of importance to the company for they increased worker efficiency and also the welfare and happiness of the employees.

Since nowhere in the legislation was there any mention of exemption from school taxes, the only reasonable construction was that exemption from school rates was not intended by the legislature. The board was not a party to the agreement, and the legislature would not have passed an Act intended to affect the interests of the schools without even

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<sup>44</sup>46 N.B.R. 506, at p. 511.



notifying the board of its action. Thus, unless the language is too clear to admit of doubt, legislation must not be construed as having any effect on parties not specifically mentioned. To hold otherwise would be unjustifiable, not in the public interest, and contrary to public policy.

Another case, R. v. Bathhurst Assessors; Ex Parte Bathhurst Company,<sup>45</sup> with almost identical facts, yielded the same judgment. One statement by Grimmer, J., is of further interest.

The town itself could not make an agreement in relation to the assessment of school taxes and the Legislature cannot be presumed to have intended as a matter of course, in and by the Act purporting to relate to the Town of Bathhurst and the Bathhurst Company, Limited, to have made the School Board subject to the agreement referred to therein and bound thereby, without specifically so stating. The language must be too clear to admit of doubt, and any such intention should not be imputed unless the Legislature in explicit and unmistakable terms puts its existence beyond question...<sup>46</sup>

It is apparent from the cases cited in this section that whether school taxes are considered by the Courts to be municipal taxes depends upon the statutory provisions in existence. Where school boards have authority to requisition on the municipality, and the council is obligated to pay over the full amount of the requisition, school taxes, collected in the general municipal levy, are indistinguishable from any other taxes. Municipalities are free to collect them from any source and in any way generally permitted by the controlling statutes. They

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<sup>45</sup>54 N.B.R. 265, (1928) 4 D.L.R. 65.

<sup>46</sup>Ibid., at p. 275.



are not subject to direction from school boards. With ratification by the legislature, they may grant certain tax exemptions, which may include exemption from school taxes.

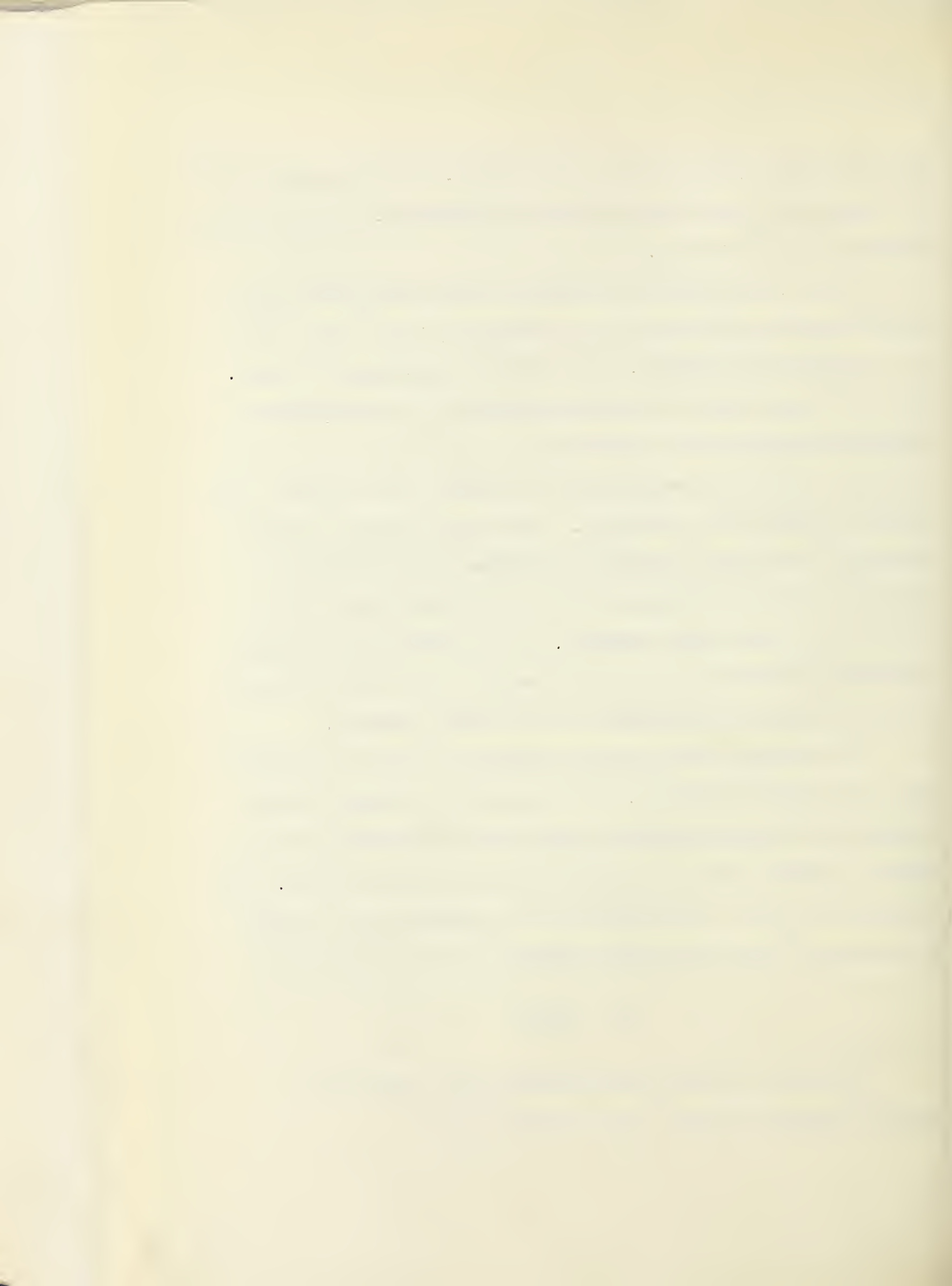
However, such agreements may apply to school taxes only if the school district and municipality are coterminous, if the school board is a requisitioning authority, and if statutory permission is granted. When the districts are not coterminous, property other than that over which the municipality has jurisdiction may be involved, and it is not within the power of the municipality to interfere, even indirectly, with property outside its own boundaries. If the school board is a taxing authority, the municipal council may not invade its jurisdiction by reducing the effective assessment on which the board levies, as it would do if it granted tax exemptions. If the statute does not permit exemptions from school rates, local governments cannot make agreements in contravention of the legislation of the central authority.

The validity of the agreements themselves, taking into consideration the exceptions mentioned, is not questioned. Although a local government body may not ordinarily commit itself indefinitely for the future, ratification by the legislature validates any such action. The agreement is subject to the conditions of the validating Act, and the Courts construe such an Act rather strictly, as in the cases cited.

#### IV. Summary

Consideration of legal cases in this chapter leads to the general principles outlined in the following summary.





The Courts have held that if a school board is a requisitioning authority, and if its requisition has been fully paid by the municipality, the board has no right to demand a further sum as a share of grants in lieu of taxes on the property of a senior government. In other words, the board may not interfere in the manner in which the municipality meets the annual school requisition. However, errors resulting from a board's requisition, should be corrected by the municipal council, if such errors result in inequalities in the tax levy. The Courts have also held that taxes wrongfully paid over to a school district, may be recovered from it, even for past years when the legislation so provides.

The Courts have held that municipal councils may require a requisition sufficient in law from school boards before they levy school taxes. In fact, it is held that according to statute, a council cannot levy any amount for school purposes without a requisition from the school board. The form of the requisition may vary according to controlling legislation, but in general it must be properly itemized, submitted on time, and submitted to the proper official. Requisitions may not be made for prospective purposes such as establishing a new school or for interest on debentures to be issued.

When a school district's organization reaches the stage of issuing debentures, such debentures are held to be conclusive evidence that the district is legally established even though there may have been irregularities in the organization procedures. Validity of procedures may be questioned before debentures are issued, but the Courts maintain that the statutes prohibit doing so afterward. It was never intended



that innocent purchasers of debentures should suffer because of irregularity in district organization. Nor was it intended that a school district should exist merely for the purpose of retiring debentures.

Borrowing powers of the school corporation are clearly stipulated by the applicable School Acts. When the board exceeds these powers, the lender may be able to recover only to the extent that his money has been used to pay the legitimate obligations of the corporation. He may, to that extent, take the place of the former creditors. Otherwise he lends money at his own risk. Any attempt by the board to evade the statutory procedures to be followed in borrowing by increasing the current requisition is not permitted by the Courts.

The Courts have held that school taxes when levied in the general municipal taxation on the requisition of the board, are municipal taxes in the broadest sense. Thus under the proper statutory provisions, a municipality may make tax exemptions to an industrial firm, which concessions include school taxes. The Courts have pointed out, however, that when such agreements are made, additional burden is thrown upon other property. The industries themselves cause expansion in school requirements, and themselves benefit from good school services, and should therefore, bear their fair share of costs. When school districts are not coterminous with municipal districts, or when school boards levy their own taxes, the above principles do not apply.



## CHAPTER VI

### THE SCHOOL BOARD IN RELATION TO PUPILS

It must be unquestionably accepted that public school education in Canada is compulsory. All children between certain ages are compelled to attend public schools or receive an education that is equivalent to that available in such schools, and penalties are provided for failure to comply with the necessary laws established by the provinces in this respect. The onus of performance here rests upon the child, or the parent or guardian. On the other hand, compulsory education makes it incumbent upon the educational authorities to provide facilities necessary to give meaning to such compulsion. The children of Canada are not only compelled to go to school, but under statute they have a right to do so. The onus here is upon the appropriate educational authorities to provide whatever is necessary to make that education possible...

Compulsory education and the right to an education, therefore, are the two sides of our educational coin. Compulsion throws the burden of effort on the child and parent. Right, less obviously throws the burden of performance on the educational authorities. The relationship between these two aspects of education involves mutual responsibilities, and at the same time, attainment of the educational objectives of the state.<sup>1</sup>

The second side of the educational coin mentioned in the above quotation is examined in this chapter. The fact that the child's right to education throws the burden of performance on the authorities, means that the school board, which has been assigned certain functions by the legislature, has definite obligations cast upon it. These obligations are, of course, set out in the educational statutes of each province. Most of them are quite clear and beyond dispute. Others, however, have come before the Courts for judicial consideration and settlement.

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<sup>1</sup>P. F. Bargen, Op. Cit. pp. 48-49.





It is those that have been before the Courts that are treated here.

It is axiomatic that schools exist for only one purpose--the education of children. All else in the program is contributory and secondary in importance. Administration, finance, buildings, supplies and equipment, and conveyance are important only to the extent that they promote the primary purpose. The existence of the school corporation, its powers and duties, and its relations with other local corporations, all revolve about the central issue of educating children.

It is not intended in this chapter to discuss in detail the legal status of school pupils.<sup>2</sup> Rather, the intention is to review the statutory rights of pupils and to examine the implications that such rights have for school boards. Hence this chapter includes such considerations as: the statutory right of children to education, obligations implied by such a right, limits of the obligations, exclusion of pupils from school, the right of boards to direct pupils to attend certain schools within a district, and the responsibility of boards for children's belongings. Conveyance of pupils to school is not discussed fully in this chapter. Rather it is treated separately in the chapter which follows. Nor is consideration given to the whole matter of the board's responsibility in case of accidents to children at school.

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<sup>2</sup>For a complete discussion of the legal status of school pupils see P. F. Bargaen, Op. Cit.



## I. The Right to Education and Implied Obligations

The right of pupils to education has been most forcefully expressed by the Courts in cases where school boards have not adequately fulfilled their statutory duties, for it is through fulfilment of the board's responsibilities that the child's rights are realized. An early New Brunswick case<sup>3</sup> points out the imperative nature of the board's duty to provide school accommodation. It involved an application to the Court for mandamus to compel school trustees of the town of Woodstock to provide accommodation and permit children, of whom plaintiff was the guardian, to attend the school. The board replied that it was unable to do so because plaintiff had moved to the district after its annual requisition for school funds. Therefore the board was unable to provide additional accommodation.

The Court held that this was not an adequate answer. Even if it had assessed insufficiently, the board was not relieved from the responsibility of providing for the children. Sir John Allen, C.J., said:

We think that it is the duty of trustees to provide sufficient accommodation for all children of the town between the ages named in the Act, and not having done so, the applicant is entitled to have the rule...absolute for mandamus unless the trustees grant the required (attendance) permits...<sup>4</sup>

A Saskatchewan Court pointed out that because children are compelled to attend schools, it is the duty of the school board to

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<sup>3</sup>Ex Parte Gallagher (1892) 31 N.B.R. 472.

<sup>4</sup>Ibid., at p. 473.



provide whatever is necessary to enable them to comply with such compulsion and for parents to escape the penalty imposed for not sending their children to school. In Ridings v. Elmhurst School Trustees<sup>5</sup> plaintiff had moved from Moosehead School District, in which her husband owned property, to work as a housekeeper in the adjoining Elmhurst district. Her children, who had come with her, attended Elmhurst School up to February, 1922, when the board decided to close its school, having made an agreement with Moosehead district to educate the children from Elmhurst. The Elmhurst board paid for tuition of all its pupils and provided conveyance for all the children except those of Mrs. Ridings, who lived in a somewhat isolated location in the district. The Ridings children did not attend school for two years, since they lived more than five miles from the Moosehead school and were unable to walk so far.

In 1924 the Elmhurst board reported the non-attendance of the Ridings children to the department of education, and were informed that they themselves were responsible for conveying all the children residing in the district. The board chairman informed Mrs. Ridings that her children must be sent to school, but she pleaded inability to do so because her buggy was broken. The board agreed to repair it and did, whereupon the children attended school for 128 days. At the end of that time Mrs. Ridings presented the board with a bill for transporting the children to school. The board refused to pay and Mrs. Ridings

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<sup>5</sup>(1927) 2 W.W.R. 159, 21 Sask. L.R. 471, (1927) 3 D.L.R. 173, reversing (1926) 3 W.W.R. 729.





proceeded against the trustees for the cost of transportation and mandamus to compel them to provide education for her children.

The action was dismissed in the lower Court but appealed. Two questions were decided by the Appeal Court:

- (1) Was the board under obligation to provide educational facilities for plaintiff's children?
- (2) What is meant by making provision for education?

The reply to the first question was clear. By statute, the board was obligated to provide education for all children of school age resident within the district. The fact that these children's father owned land in the Moosehead district made no difference. The Act provided for compulsory attendance and penalties for violations, and therefore the board must make such attendance possible.

On the second question, the trial judge had held that making an agreement with the neighboring district was sufficient provision, but the Appeal Court held this view to be too narrow. If the district was too large, or the school too far away to be reasonably accessible to the children, provision had not been made for their education. The board was obligated to do more, such as providing necessary transportation. The board had had the option of making the agreement with Moosehead district or not making it; it could provide transportation or not as it saw fit. Having decided to do both, it was obligated to extend these services to all the children of the district. The Act did not give the board power to select some children for whom to provide facilities and not others. Because the board had failed in its duty, the plaintiff's application for mandamus was granted.



In another Saskatchewan case, Wilkinson v. Thomas,<sup>6</sup> it was held that children between the ages mentioned in the School Act have the imperative right to attend school and receive instruction. The Act goes so far as to provide penalties for not permitting children to receive the benefit of the right conferred on them. The right is the right of the child himself, and not at the discretion of the parent or school board. Therefore, the authorities are under absolute obligation to provide, and mandamus can be used to compel them to do so.

An Alberta case, Henschel v. The Board of Medicine Hat School Division,<sup>7</sup> further considered the meaning of adequate provision for the education of the child. In 1946 a divisional school board resolved to close one of its rural schools because only the children of one family, that of plaintiff, were in attendance. Accordingly, the chairman of the board and the school superintendent arranged for the children to attend schools in the city of Medicine Hat, agreeing to pay a boarding allowance of \$600 for the year 1946-47. The board ratified the agreement and the Henschel children moved to Medicine Hat for the school term. Because he could not find a suitable house to rent, Henschel purchased one in the city and his wife and children lived there while the children attended school, but moved back to his ranch for the summer months.

In the summer of 1947 the parents again negotiated with the board to continue the agreement. The chairman and superintendent agreed to

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<sup>6</sup>(1928) 2 W.W.R. 700.

<sup>7</sup>(1950) 2 W.W.R. 369.



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extend it, but the board refused to do so, arguing that since Henschel now owned property and paid taxes in the city, his children had the right to attend city schools and the divisional board had no further responsibilities. The board made no payment in 1947-48.

In the summer of 1948 plaintiff notified the board that it would have to reopen the rural school, and the board did so for the term 1948-49. However, it declined to do so for the 1949-50 term. The children were sent to Medicine Hat and plaintiff brought an action against the board applying for mandamus to compel it to discharge its statutory duty and for damages of \$600 for alleged breach of contract in 1947-48.

On the claim for breach of contract, the Court ruled that there had been none, since there was no contract. Though the chairman and the superintendent had agreed to the previous arrangement, they had no authority to bind the board, which itself had refused to participate.

On the other charge, however, Sissons, D.C.J., held:

The duty to provide adequate school accommodation for the purposes of the district is absolute. Even if these sections weren't in the Act, this primary duty would be implied. Children have a right to be educated, and the school district and school division have no other reason for existence.<sup>8</sup>

There may, however, be discretion as to what is "adequate school accommodation," or as to the alternate methods which may be used to provide it. The board could operate the rural school in the district where the children lived, or it could make arrangements whereby the children would attend schools in other districts. However, in this case, the board had provided no accommodation whatsoever during 1947-48. The

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<sup>8</sup>Ibid., at p. 372.





contention that the trustees were no longer responsible because plaintiff was now a ratepayer in Medicine Hat and that his children could attend schools there, must be rejected. The arrangement was due solely to failure of the board to provide accommodation in the home school district, and did not relieve the board of its obligation. Plaintiff's principal place of residence was in the country where he owned a large ranch, well managed, well stocked and comfortable, and therefore the family could not be expected to transfer residence to the city.

Does the duty of the board exist in common law, or is it a statutory duty subject to statutory penalty? The Court ruled that although the statute creates and imposes the obligation, it gives no method of enforcing the obligation. Consequently, the Court must look to the common law for remedy. Plaintiff was granted an order for mandamus compelling the board to discharge its statutory obligation and also was held entitled to judgment for damages suffered by reason of the board's failure to perform its statutory duty.

A Quebec case emphasizes the child's right to education and that it may not be deprived of the right.<sup>9</sup> The Act of 1943 made school commissioners responsible for providing education for all children within the district from five to fourteen years of age. In this case, the commissioners, out of animosity to the father, refused to promote a child, though he had performed satisfactorily at school. The Court held that this was sufficient justification for the father to remove

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<sup>9</sup>Brault v. Commissaires d'Ecoles de Ste. Brigide (1951)  
R.L. 479.



his child from the school, place him in another, and claim from the local school commission the added expense of doing so.

McLeod v. Salmon Arm School Trustees

Because it treats extensively the whole question of rights and obligations in public education, bringing to a focus the issues raised in the previous cases, McLeod v. Salmon Arm School Trustees,<sup>10</sup> is of particular interest and is treated in detail.

The Setting. In 1951 the consolidated school district of Salmon Arm, British Columbia, embraced the city of Salmon Arm, the Rural Municipality of Salmon Arm and some surrounding unorganized territory. The board, a corporation by the provisions of the Act, consisted of elected trustees representing the contributing municipalities. As in other provinces, it was charged with the duty of providing educational services at the level required and authorized by the Act and by regulation. Also as in other provinces, educational revenues were provided by taxation in the two municipalities, with the government paying, in addition to regular school grants for current and capital purposes, the whole cost of educating children from the unorganized territory. Under The Public Schools Act municipal councils were required to levy and collect taxes on the board's requisition; but there was a further provision that in case a requisition was disputed, it was to be submitted to an arbitration board, whose ruling would be binding on all parties.

The Facts in the Case. In 1951 the board requisitioned \$328,000 from the two municipalities. This requisition was disputed and was

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<sup>10</sup>4 W.W.R. 385, (1952)2 D.L.R. 562.



submitted to arbitration. The arbitration board's ruling cut \$80,000, or approximately twenty-five per cent, from the requisition. The board subsequently contended that it could not operate the schools for a whole year on this reduced amount and negotiated with the municipal governments for supplementary grants. The city of Salmon Arm agreed to make a further contribution of \$11,000 but only on condition that the money would be used exclusively for the education of city children. The rural municipality refused to make any further contribution.

On October 1, 1951, the board closed its schools to all children from the rural municipality. This action deprived 510, or about one-third of all the children in the consolidated district, of their education. The rural municipality immediately applied for a mandamus to compel the school board to reopen the schools and provide education for the children.

In the Trial Court the municipality based its case firmly on the earlier award of the arbitration board. The school board answered by stating that the award made it impossible to operate the schools all year. Its requisition had been cut by twenty-five per cent and thus it had only enough money to operate schools for three-fourths of the year. The individual trustees could not be expected to provide, personally, the necessary funds to carry on. At October 1 the board had had no money to carry on education services without a supplementary contribution, which the municipality had refused to make. Therefore, only one course remained open to it--to close the schools.

The trial judge agreed that he could not order the school board to reopen the schools when it was clearly impossible for it to comply





with such an order. Accordingly he dismissed the action. The municipality appealed to the Appellate Division of the British Columbia Supreme Court.

The Judgment on Appeal. There were three main issues before the Court:

- (1) Is the plea of impossibility because of lack of funds valid to relieve the board of its statutory duty to provide education for all the children of the school district?
- (2) If it is not valid, is mandamus the proper remedy to correct the violation?
- (3) Where does the primary responsibility for the education of children lie? With the ratepayers? With the school board? With the province?

Issue I: The Court held that the school board had defied the law in three ways: it had refused to accept the arbitration award even though that award was binding on it; it had made a private agreement with the city of Salmon Arm even though it had no authority to do so; it had deprived one-third of the children under its jurisdiction of their statutory right to education.

The plea of impossibility to observe an imperative statutory duty because of lack of funds was no answer to an application for a writ of mandamus. To hold otherwise might establish a dangerous precedent under which public and governmental authorities might be encouraged to disregard prudent limitations on their expenditures and then rely on their own improvidence as an excuse for not fulfilling their statutory duties. Furthermore, it is an established legal principle that a person cannot plead his own default as an answer to evasion of



a statutory duty. At the arbitration proceedings the board had not argued that it would lack funds. Nor had it shown since that time that it had made any bona fide attempt to reduce its expenditures in compliance with the award. Apparently it had been convinced at the outset that the ruling was wrong and had obdurately persisted in its own course of action. Also, the Court pointed out, it was not for the school board to say whether or not compliance with a statute is possible. This is outside its jurisdiction. The statute made the award final and conclusive and from that point the board's duty was clear and imperative.

What could the board have done? The intention of The Public Schools Act is clear; the interests of the children are paramount, and children must be educated without discrimination. Boards are required to provide for all the children, at the same time keeping expenditures within the moneys allowed by statute. Therefore, had the board been convinced at the time of the arbitration award that it would not have sufficient funds to carry on the instructional program for the whole year, and had it had the interests of the children foremost in mind, it would have resigned instead of closing the schools. Upon such resignation the province would have appointed an official trustee to administer the schools. The Court said:

People in public office ought to resign if they find no way left to carry out their statutory duties. They subject themselves to censure, invite public approbrium and legal action, if in such circumstances they remain in public office and attempt to evade or pervert the statute by which their conduct is confined.<sup>11</sup>

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<sup>112</sup> D.L.R. 562, at p. 567.



Issue II: In granting the mandamus the Court followed the Alberta ruling in Henschel v. Medicine Hat School Division to the effect that when there is no statutory remedy, the Court must resort to the common law. Mandamus is the only remedy where there is no other way to enforce obedience to the law when in justice and good government there should be a way. The Act's paramount concern is to insure education for all children in the province and where the board's failure to obey the statute results in a deliberate course of conduct, such conduct is not a ground for refusing a mandamus. Since the board is a corporation, and had violated the Act in its corporate capacity, the mandamus was directed to the board and not to the individual members.

Further, the Court said:

Mandamus is of a highly remedial nature and one to be facilitated in order to secure efficient administration of justice rather than to be hedged about by refinements which detract from that end...If it is not upheld here, the children afflicted are (to use Lord Mansfield's words) "put out of the protection of the law." The very circumstance that the children are without remedy requires no further reason for granting mandamus.<sup>12</sup>

Issue III: Whose responsibility is education? Since it is clear that in the Act the interests of children are paramount, whose responsibility is their education?

Ratepayers have some responsibility, but when they have fulfilled the requirements of the statutes, they have discharged their responsibility.

The school board has the immediate responsibility for the education of the children. Its duties and powers are clearly defined by

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<sup>12</sup>Ibid., at p. 571.





statute, and it is required to operate within the statutes. Its duty is to all children; it cannot select some for education and not others. The board must provide; it cannot chose whether or not to do so, for the statute is mandatory.

The ultimate responsibility for education lies with the province. It enacts the legislation; it compels school attendance; it sets the curriculum and examinations; it assumes a share of the cost of education. Hence it must ensure that services are provided to give reality to all these things. If it becomes impossible for a school board to carry out its statutory duties because of restricting legislation, the province is primarily responsible. Because the duties of school boards are delegated by the legislature, they can be shifted back to that original authority.

In summary the Court said:

The taxpayers of the district itself have acted according to law and ought not to be penalized. The province ought to assist in what is rapidly becoming not only a Gilbertian situation, but one in which the taxpayers of the province may easily become aroused concerning the manner in which their money is spent. The school board have not perceived the obvious, and have failed in consequence to act in a manner that would ensure the Province shouldered the major responsibility it has assumed in The Public Schools Act.<sup>13</sup>

#### Summary of Rights and obligations.

The following generalizations become evident from the cases which have been cited in this section:

- (1) Children have a statutory right to education. The right belongs to the child himself rather than to parents or guardians, and it is not subject to the discretion of school boards, or any other persons.

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<sup>13</sup> Ibid., at p. 572.



- (2) School boards have an obligation to provide accommodation and facilities so that the child's right may be realized. However, the Courts hold that the method of provision is at the board's discretion. The board may provide school facilities in the child's home district; it may provide through agreement with another board, conveying the children if necessary; or it may make boarding arrangements. The board must place children in position to receive education. The duty to provide, through whatever means the board may determine, is imperative and subject only to the provisions of the statutes. It may not be discharged in a discriminatory manner.
- (3) It is interesting to note that though the Courts emphasize the child's right to education and insist upon the board's duty to provide adequate accommodation, they do not presume to define the kind of education to which the child has a right, nor what constitutes adequate accommodation. Definition of these factors is apparently left to the educational authorities themselves. Adequate accommodation seems to mean the same accommodation as that to which other pupils in the community are entitled, and this will vary with time and location. For example, 1920 standards of accommodation would not be acceptable in 1960, nor would rural standards be adequate in urban areas.
- (4) The duty to provide education is a statutory duty and therefore subject to the provisions of the statute. When there is no statutory means of enforcing performance of the duty, the Courts resort to the common law for remedies.



- (5) When the statutes make it impossible, through contradiction or undue restriction, for the board to discharge its obligations, there is one method of recourse only. The board can resign and shift the responsibility for education back to the province which has the original jurisdiction in education by virtue of constitutional provisions. The board may not modify the statute to meet emergent situations.

## II. Limitations of the Board's Obligations

Although the board is obligated to provide educational facilities equally for school children under its authority, there are certain meliorating provisions. Not any or all children may call upon a particular board to provide them with education. They can demand only those rights which are granted by the statutes. The child must qualify before the board becomes obligated to him. The chief qualification is that of residence.

### Residence

The right to attend the school of a district is, in general, contingent upon the child's residence in the district, and hence the board's obligation to provide extends only to residents, and to them only as provided by law. Thus in Hall v. Stisted School Trustees<sup>14</sup> the board was required to provide accommodation for only two-thirds of the children resident in the school district. Infant plaintiff Hall.

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<sup>14</sup>(1897) 24 O.A.R. 276 affirming 28 O.R. 127.





residing with one Spiers under an arrangement with Dr. Bernardo's Home, sued the board to admit him to school. Some fifteen other children in the district were in similar circumstances, claiming to be under legal guardianship and therefore resident in the district and qualifying for school attendance. The Court held that although Spiers had taken Hall into his home, he was not his legal guardian and therefore, according to the statute, Hall was not resident in the district. Since there was sufficient accommodation for two-thirds of the resident children, though not enough to include Hall, the board had done all that was required of it and was not obligated to provide education for him.

Similarly in Quebec, a board was not required to provide for a boy residing with his grandfather. Since the Act required provision of accommodation only for those resident and domiciled in the district, and because a child "domiciled" meant one living with his father, mother or tutor, the boy could not require the board to accept him in its school.<sup>15</sup>

However, some children not resident or domiciled in the district must be accommodated, if the statutes so require. Thus in Quebec, under the provisions of the Child Protection Tuberculosis Act, children who are placed with families living in a school district have a right to attend school, and commissioners are bound to accept them on the same basis as

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<sup>15</sup>Pelletier v. Rock Forest School Commissioners (1945)  
Que. S.C. 140.



children actually resident in the district.<sup>16</sup>

A New Brunswick case<sup>17</sup> makes very clear the meaning of residence in relation to a board's educational obligations. The action involved an application for mandamus to compel the board to admit applicant's children to their school. Although he owned land in another district, he had moved with most of his family to the district in question, where he had applied to be assessed for school purposes. The board contended that his change of residence was not bona fide, that he had moved only to give his children school privileges, and refused both to assess him and to admit his children to school.

The question before the Court was: Were the children actually resident in the school district? If so, they had by statute, the right to attend the district school. The Court ruled for the applicant, saying:

...The Common Schools Act was passed to provide schools for all children within certain ages, at the public expense by means of taxation. The law was placed on the statute book in the interest of the children. The residence necessary to give the right to attend school is the residence of the child. True, that for many, and perhaps most purposes, the residence of the father determines that of the child (a minor). A man can have but one domicile, but may have more than one place of residence, and may change it from time to time at will.<sup>18</sup>

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<sup>16</sup>Procureur-General de Quebec v. Commissaires d'Ecoles de Mirabel (1944) Que. S.C. 299; and see also Societe d'Adoption de l'enfance v. Commissaires d'Ecoles du Bas de Ste. Janvier (1956) Que. S.C. 94.

<sup>17</sup>Ex Parte Miller (1897) 34 N.B.R. 381.

<sup>18</sup>Ibid., at p. 319.



The refusal of trustees to assess so as to prevent children from attending school, cannot affect the children's right to attend, nor, by necessary implication, the board's obligation to accommodate them.

Defining residence, the Court said:

Residence means where one actually resides, and may be changed every month or oftener. While not necessary for determining this case, I think, however, that the actual residence of the child gives the right to attend school, and that the child may have a residence sufficient to entitle it to school privileges independent of the residence of the parent.<sup>19</sup>

The reasoning in Ex Parte Miller was upheld in Ex Parte Lambert<sup>20</sup> in which the Court ruled that a boy living with his uncle who was a resident ratepayer in a school district, was entitled, on the basis of such residence, to attend a high school within the parish without payment of fees.

The apparent inconsistency between the decisions in the Hall case and the later Miller and Lambert cases is due to a difference in the statutory requirements and the definition of residence. In the first, the child was considered to be resident only if he was living with a parent or legal guardian. In the later cases, the statute was interpreted more broadly, defining residence as the residence of the child, independent of his parent or guardian. Such a broad interpretation is, of course, possible only if the language of the statute permits it.

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<sup>19</sup>Ibid., at p. 321.

<sup>20</sup>(1930) 1 M.P.R. 12 (N.B.)





### The Payment of Rates

Does the payment of school rates alter the effect of residence in so far as obligating school boards to provide school accommodation? The answer depends upon the provisions of the applicable statutes. Thus in British Columbia, parents residing in the municipality of Oak Bay, which had a high school, wished to send their children to a high school in Victoria. They owned property there and paid school rates. The Court held, however, that according to the Act, there was no provision whereby a ratepayer has the right to have his children attend school in a municipality where he pays rates independent of his residence.<sup>21</sup> The right to attend British Columbia schools was in no way connected with the payment of rates.

Other provinces may have slightly different statutory provisions. For example, in Manitoba it was held<sup>22</sup> that by the provisions of the statute children were entitled to attend school without payment of fees if their parents or guardians were residents of the district, or if they paid school rates equal to the average paid by the actual taxpayers of the district, though they were resident elsewhere.

### III. Exclusion of Pupils from School

Pupils may forfeit their right to attend schools provided by boards if they violate the regulations lawfully imposed upon their

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<sup>21</sup>Patterson v. Victoria School Trustees (1917) 1 W.W.R. 526, 24 B.C.R. 365.

<sup>22</sup>Inkster v. Minitonka School District (1912) 2 W.W.R. 1105, 22 W.L.R. 57, 22 Man. R. 487, 6 D.L.R. 57.



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conduct. Furthermore, there may be statutes other than the School Acts which, unless complied with, may deprive a child of the right to attend school. The Courts have also ruled on the effect of non-compliance with regulations on grounds of religious belief and the board's right to exclude pupils as a result.

Suspension and Expulsion from School. An early Ontario case reconciled the matters of the child's statutory right to education and the board's right to suspend him for misconduct at school.<sup>23</sup> In this case a boy of thirteen was dismissed by the teacher for disobedience, impudence and refusal to be punished for his misconduct. The board concurred in the teacher's action and notified the father that the boy would be readmitted if he apologized to the teacher. The father refused to acknowledge that his son was at fault, and under pressure from his solicitors, the board agreed to admit the boy following one day's official suspension. They notified the father of this decision, but on the next day they met again and reaffirmed their earlier resolution that an apology would be required. They did not notify the father of this change in their decision.

The pupil returned to school but refused to make an apology to the teacher, who in turn, refused to instruct him. Thereupon the father brought legal action against both the teacher and the trustees. The trial judge ruled that the board had imposed conditions for readmission which were beyond their powers to impose. In view of the father's reprehensible behavior, however, he assessed only nominal damages. The

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<sup>23</sup>Re Minister of Education: McIntyre v. Blanchard Public School Trustees (1886) 11 O.R. 439.



case against the teacher was dismissed since she had suspended the pupil in a proper manner. This decision was appealed by the Minister of Education on behalf of the trustees.

The Appeal Court reversed the ruling, maintaining that the condition requiring an apology was a reasonable one. Though the Court was extremely critical of the father's attitude and behavior, it confined itself to the legal rights involved. It could find no transgression of the rights of the parent or child. The board had committed an error in not giving notice of its change of decision, but could not be held liable for such an error, unless the trustees were shown to have been malicious.

Galt, J., commented:

It would be impossible to carry on a public school...if a boy was entitled, as a matter of right, to receive instruction notwithstanding misconduct toward his teacher without making an apology when the trustees find that he has misconducted himself.<sup>24</sup>

Thus, the child has the right to education provided he conducts himself with a reasonable measure of decorum in the school. It is not a right which carries no corresponding responsibilities.

In another case involving school discipline<sup>25</sup> the Court refused to interfere, when it found that the teacher and the board had acted unwisely, though not maliciously. A pupil had cut the top of his desk, and was suspended until he put a new top on the desk "with his own hands." The Court felt that this condition was unwise and certainly fanciful. The

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<sup>24</sup>Ibid., at p. 442.

<sup>25</sup>Re McCallum and Brant Public School Trustees (1889)  
17 O.R. 451.





regulations provided that such damage to school furniture should be paid for by the parents, and therefore the teacher had been in error to impose a different condition. However, since the teacher had later offered to assist the boy, and since the boy and his father had refused the proffered assistance, the Court declined to interfere. Reinstatement of the pupil would only aggravate the conflict between the boy and his teacher and undercut the teacher's authority to the detriment of the whole school. Mandamus would not be granted to correct a supposed error by a teacher or trustee in a matter of school discipline.

A Quebec case also showed that though a school board is obligated to provide education for all children of compulsory school age, it may expel pupils for insubordination. The Court refused to grant mandamus to compel the board to readmit the children even if the cause of insubordination was mental defectiveness, and even though the only reason given by commissioners for the expulsion was the inability of the children to follow the course of instruction.<sup>26</sup>

Thus, it might be argued that the initial cause in the board's obligation to provide educational facilities is the child's right to education. Such a right imposes an obligation. However, when the board has provided school accommodation, it may in turn impose certain responsibilities on the pupil. Among these is the responsibility of conducting himself in a proper manner, not only in relation to teachers and other students, but also toward the physical facilities provided by

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<sup>26</sup> Bouchard v. Commissaires d'Ecoles de St. Mathieu de Dixville (1950) S.C.R. 479, affirming (1949) Que. K.B. 30.



the board. If he does not do so, the pupil may forfeit his right to school privileges.

Provisions of Legislation other than School Acts. A child may also be excluded from school, and hence the board may be relieved of its statutory duty to him, if he does not comply with provisions of public health laws. However, since such laws may infringe rights granted by other statutes, they are strictly construed by the Courts, and unless the legislature has made clear its intention to exclude pupils for violation of health laws, the board may not deny them access to the school. A case in point is the question of admission to school without vaccination against smallpox when the statutes require such vaccination. Two legal cases clarify the status of both child and board in this respect. The first, Clowes v. Edmonton Public School Board,<sup>27</sup> concerned a child who had been refused admittance to school until he had been vaccinated. The board pleaded justification of the exclusion on the grounds that a regulation issued by the Alberta Board of Health required every child to produce a certificate of vaccination before being admitted to school. The Court held that this regulation could not be reconciled with the Truancy Act which compelled all children between the ages of seven and fourteen years to attend school. In effect, a regulation of a provincial administrative agency was attempting to override the action of the legislature. Such a regulation was therefore ultra vires the health board. In the absence of

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<sup>27</sup>(1915) 9 W.W.R. 372, 32 W.L.R. 733, 9 Alta. L.R. 106, 25 D.L.R. 449.



specific legislation providing for exclusion from school on the grounds of the child's not being vaccinated, the school board was not justified in its action.

The situation when there is such legislation, is given in the other case, Yarwood v. Smith's Falls Board of Education.<sup>28</sup> The school board, during an epidemic of smallpox in the community, also excluded children from school because they had not been vaccinated. The Court found that there was legislative provision for such exclusion but that it had not been properly followed. The Court said:

In a case such as this, children who have not been vaccinated may be lawfully excluded from schools if the provisions of the statutes in that behalf have been complied with. Exclusion involves, however, the infringement and denial of a prima facie right, and the statutory proceedings justifying it must be carefully pursued. Here the statutes had not been complied with, and the plaintiffs...are entitled to at least nominal damages.<sup>29</sup>

Because the child's right to education is a statutory right granted by the legislature, it can be revoked by the legislature. To do so, however, requires clear statutory language, and specific action by the legislature. The regulation of an administrative agency set up by the legislature is powerless to interfere with the statute, either to extend or restrict its provisions. Thus in the Clowes case, the regulation of a board of health could not remove a right granted by Act of the legislature, and the school board, which receives its powers from the legislature, could not legally exercise additional powers

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<sup>28</sup>(1922) 23 O.W.N. 38.

<sup>29</sup>Ibid., at p. 39.





granted by the board of health. Even when, as in the Yarwood case, the legislature has clearly provided for restriction of the right to education, such restriction is severely limited. The board, in applying the restriction, may go only so far as the legislature has permitted, and it can do so only by following precisely the provisions of the statute.

Religious Objections to School Exercises. The right of school boards to exclude pupils who refuse to participate in patriotic exercises is also controlled by statute. This is illustrated by two cases involving children of Jehovah's Witnesses who refused to salute the flag, to recite the pledge of allegiance and to join in singing "God Save the King."

In the Alberta case,<sup>30</sup> children were expelled for not saluting the flag in compliance with a board regulation that school opening exercises, including the flag salute and singing of the national anthem, should be conducted. The regulation, passes under authority of the statute, was held to be valid. Although the provisions of the Act regarding patriotic exercises were not imperative, the board had discretionary power to require such observances and to direct the time, manner and place of their performance. The Act made no provision for exceptions and therefore the board's action in expelling the pupils was upheld. Subsequent amendment of the statute has, however, made provision for abstention from such exercises as described above.

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<sup>30</sup>Ruman v. Lethbridge School Board Trustees (1943)  
3 W.W.R. 340.



The Ontario case,<sup>31</sup> presents a more comprehensive consideration of the issues involved. In 1940 plaintiff's two children, fourteen and sixteen years of age, were also sent home from school for refusing to participate in patriotic exercises. The older boy, after taking private instruction for two years and passing the high school entrance examinations, entered a Hamilton high school, but was again expelled for the same reason. In the trial, at which plaintiff sought to have the children readmitted to the schools, the judge held that principals and teachers had the right to compel pupils to participate in the exercises. The plaintiff appealed.

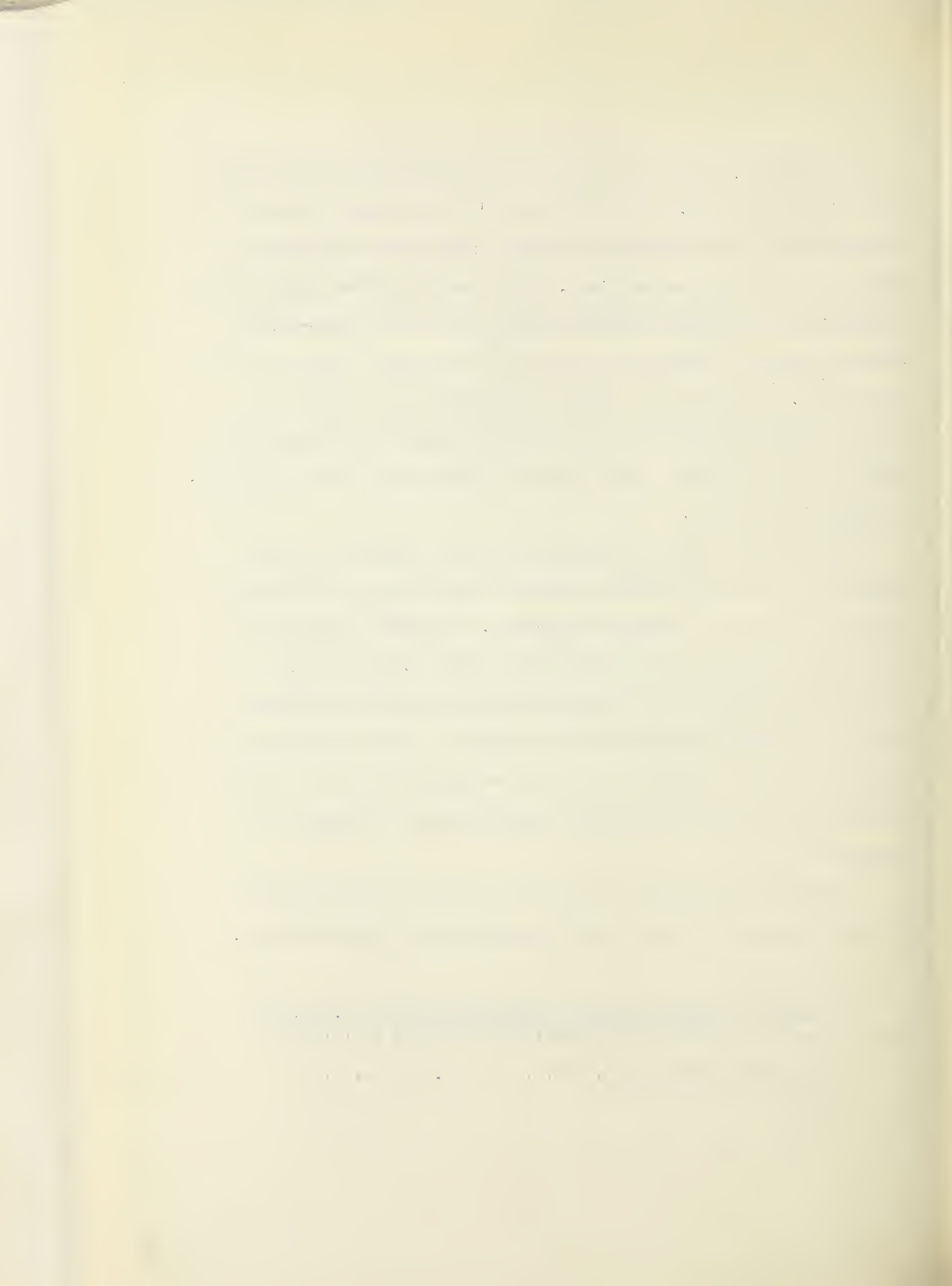
The question before the Appeal Court was whether or not the legislature had empowered school boards or their teachers to require pupils to take part in patriotic exercises. The Act<sup>32</sup> provided that every person from five to twenty-one years "shall have the right to attend some such school in the urban municipality where he resides." Sec. 7(1) of the Act provided that "No pupil in a public school shall be required to read or study in or from any religious book, or to join in any exercise of devotion or religion objected to by his parent or guardian."

Plaintiffs urged that to them the exercises in question were religious exercises to which they objected because of their beliefs.

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<sup>31</sup>Donald v. Hamilton Board of Education (1945) 3 D.L.R. 424, (1945) O.R. 518, reversing (1944) O.R. 475, (1944) 4 D.L.R. 227.

<sup>32</sup>The Public Schools Act, R.S.O. 1937, c. 357, s. 5.



The board contended that these were not religious exercises but merely a step in teaching loyalty and love of country. The Court took a broad view, stating:

That certain acts and exercises and symbols at certain times to certain people, connote a significance or meaning which, at other times or to other people, is completely absent, is a fact so obvious from history, and from observation, that it needs no elaboration.<sup>33</sup>

The statute permits objectors to refrain from participating in religious exercises, but does not define what these exercises are. The Court also refused to define them. Since the children had not caused a disturbance, but had stood quietly and respectfully while the others sang or recited, they could not be accused of conduct injurious to the moral tone of the school. The action of the board, though in good faith, was contrary to the provisions of the statute, and therefore illegal.

The child's objection to participation in certain school exercises on religious grounds may or may not affect his right to schooling and therefore the board's obligation to him. The question is open to two lines of reasoning. Under the first approach the determining factor is the provision of the governing statute. Although freedom of religious observance is one of the basic tenets of Canadian society, there is no inherent right in this respect unless it is specifically granted by statute. In the absence of a Bill of Rights the individual may find that he has only those rights granted by the statutes. The child's right to education and the board's obligation to provide educational

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<sup>33</sup>(1945) O.R. 518, at p. 530.





facilities are delimited by statute. If the statute extends the right to refrain from participating in school exercises, the board may not enforce such observances. When there is no statutory provision, the board may require observance, under penalty of exclusion from school.

On the other hand, as Barga<sup>34</sup> points out in his discussion of the Chabot case, which occurred in Quebec, when the positive law leads to an injustice, the Court may interpret statutes and the intention of the legislature in terms of natural law. In such a case, the principle of religious freedom is held to be supreme, and not to be abrogated by statute. When such concepts are applied, the individual's rights do not depend upon the statute, but are considered to be inherent in the very nature of man. Then the board would have no right to exclude a child from school for refusing to participate in patriotic exercises on religious grounds, regardless of the statutory provisions.

Needless to say, the two schools of legal thought on these approaches to interpreting the law are in disagreement as to what the Courts should do when confronted with such a situation. The two cases above, (Ruman and Donald) however, were both judged on the basis of the positive law.

#### IV. Right of Board to Direct Which School to Attend

It has been established that the child has a right to education and that the board has a duty to provide adequate accommodation. In the course of such provision the board may find it expedient to build two or

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<sup>34</sup>P. F. Barga, Op. Cit., pp. 93-100.



more schools within a district. Does the child, or his parent, have the right to choose the school he wishes to attend? What powers has the board to direct which school children shall attend, even though it may involve inconvenience to the child or parent? These questions were answered in a number of cases, two of which are cited here.

In Dunn v. Windsor Board of Education<sup>35</sup> the board had provided two schools, one a central school and the other for negro children. During the previous term, plaintiff's child had attended the colored school, but at the beginning of the new term, she was presented at the other, which was nearer her home. The principal refused to admit her, directing the father to apply to the board. The father, however, instructed his child to remain until she was expelled.

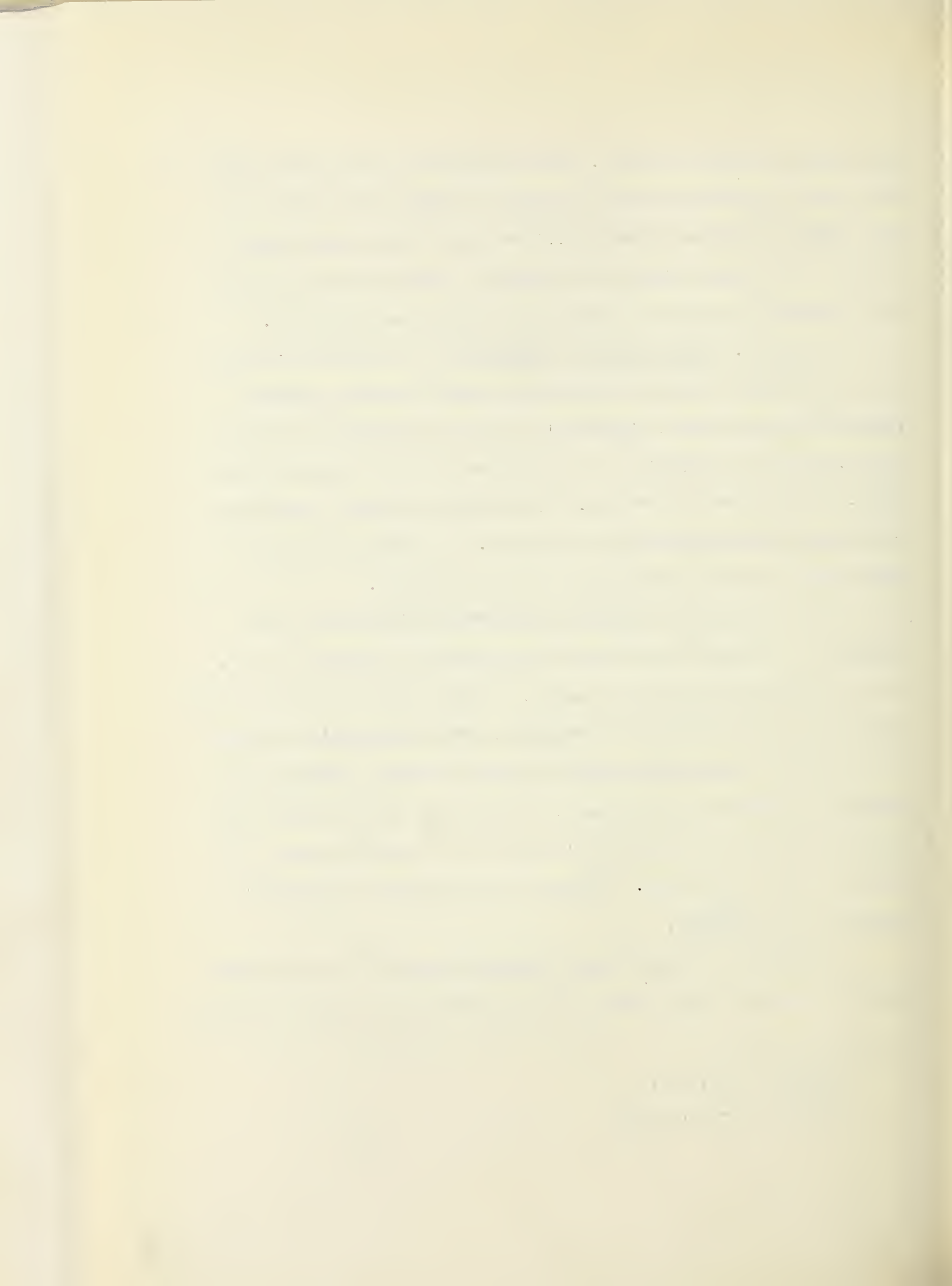
In the subsequent litigation, plaintiff contended that the exclusion of his child was a case of discrimination because of color. The board replied that this was not so. Rather there was not sufficient accommodation in the school to accept her. The Court pointed out that the regulations required the pupil to attend the school directed by the inspector and ratified by the board. Further, it was shown that there was no accommodation for plaintiff's child in the central school, but that there was in the other. This was a valid answer to plaintiff's application for mandamus.

In Patrick v. Yorkton School District Trustees<sup>36</sup> the rights and powers of the school board were more clearly defined. In 1913 the board

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<sup>35</sup>(1883) 6 O.R. 125.

<sup>36</sup>(1914) 6 W.W.R. 1107.



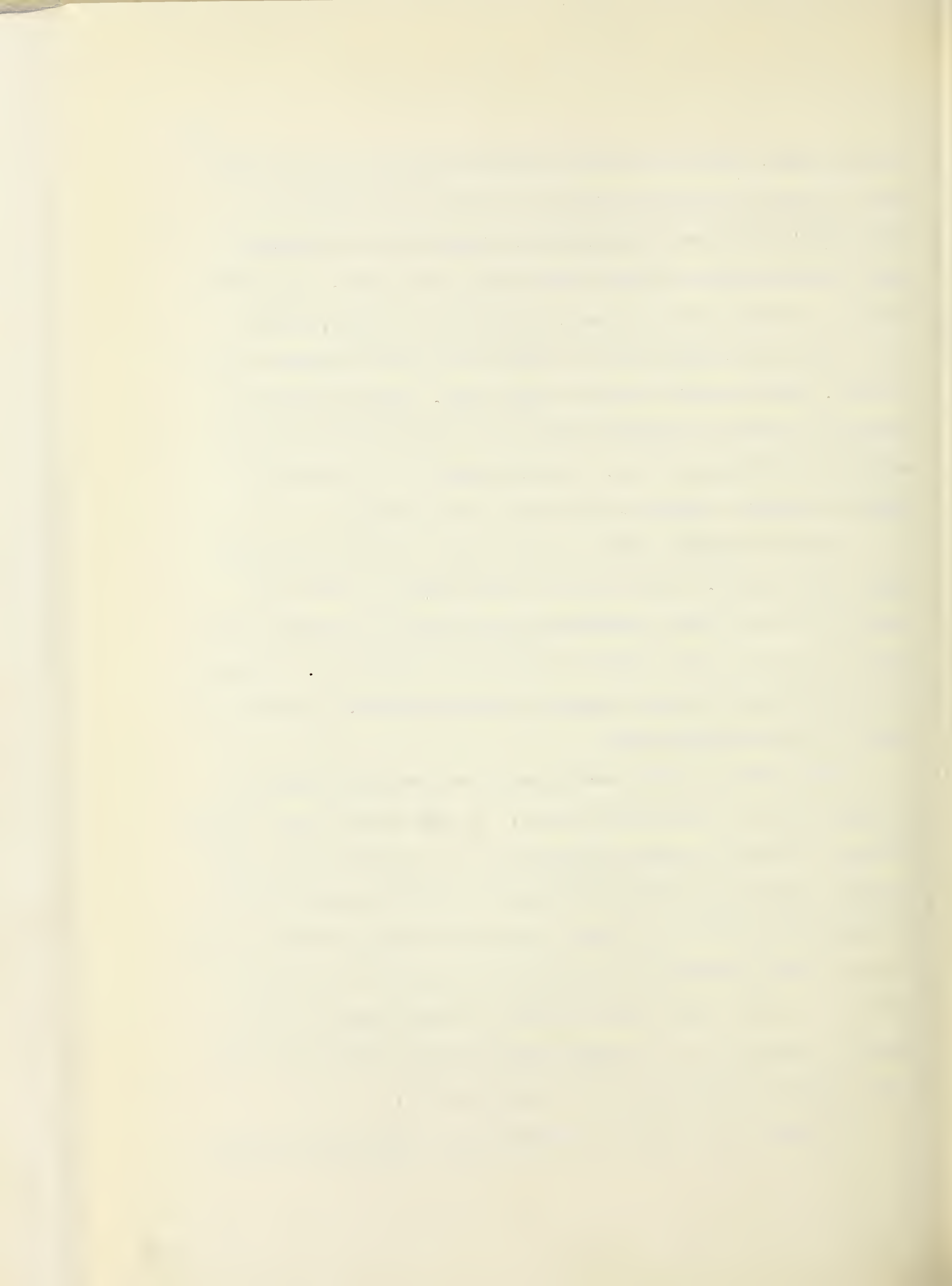
of the Yorkton, Saskatchewan, school district, finding that its school was too small to accommodate all pupils, built a second school in another part of the town and divided the district into two attendance areas, directing which children should attend each school. Plaintiff's children, living in the attendance area for the new school, but much nearer the old one, were sent to the old one when school opened for the new term. The principal refused to accept them. Plaintiff applied to the board to admit his children, but the board maintained its position regarding the attendance areas. He then brought suit to compel the board to admit his children to the school he had selected.

The Court indicated that it is the duty of the board to provide school accommodation. When one school house becomes too small, the board must provide further accommodation, and this may be another building in the town on a site deemed by trustees to be desirable. The board had provided a second school which was properly situated. Who was to attend it, and who would decide?

Boards have only the powers expressly or impliedly delegated by the legislature, to perform their duties. The legislature having imposed the duty of providing adequate accommodation, has impliedly given boards the power to make all regulations necessary or advisable, not only for the management of the school itself, but for determining attendance areas that can be most suitably served by each of the schools. As long as trustees act in good faith and to the best of their judgment for the purpose of securing the best conduct and management of schools in their charge, their discretion must not be interfered with.

If parents had the power to determine which school their children





should attend, one school might be over-crowded and the other have too few pupils. Confusion and disagreement would result. The body which should take the necessary measures to minimize the inconvenience and confusion therefore, is the school board.

Where there are two or more schools in a district the Court held that the board may direct which school a pupil must attend. As long as it exercises its discretion with fairness and in the public interest, the Courts do not interfere. The power to set up attendance areas for schools, even if not expressly granted by statute, is to be considered a necessary implication of the legislature's having imposed on the board the duty of providing adequate school accommodation. The Courts maintain that only in this way can confusion and major inconvenience be avoided.

#### V. Responsibility for Pupils' Property at School

Children frequently lost articles of clothing, playthings and other belongings while they are at school. Who is responsible for such losses? Can the board be held liable, if it does not prevent loss?

An Ontario case, Stevenson v. Toronto Board of Education,<sup>37</sup> involved the loss of a pupil's coat from a school cloakroom. Plaintiff sued the board to recover the cost of the garment. The trial justice found for the plaintiff and the board appealed. At the appeal, Meridith, C.J.C.P., said:

Boards of education are not insurers of school children's clothing; they are responsible for its loss or injury only

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<sup>37</sup>(1919) 46 O.L.R. 146, 49 D.L.R. 673.



when the loss or injury is caused by their negligence; that is, their want of reasonable care, the care which is ordinarily taken under similar circumstances.<sup>38</sup>

No want of care had been proved here. The board provided cloakrooms that were safe for all practical purposes. The Court could find no negligence, so the board was not accountable for the loss.

## VI. Summary

The Courts have held that the right of the child to attend school and the obligation of the board to provide accommodation, depend upon the residence of the child rather than upon the payment of rates, unless the statutes provide otherwise. Provision of accommodation may involve operation of a local school, transporting children to a more distant school, or boarding them near school facilities. The board has no power to discriminate against some children, nor to circumvent the provisions of the statutes which govern school board operations.

Mandamus is granted by the Courts when the statutes do not provide methods by which to enforce the performance of obligations imposed on the board. If a board finds it impossible to perform its statutory duties, its only recourse is to resign and shift the responsibility for education back to the province.

The Courts have also held that the child's right to attend school is not absolute. The right may be forfeited by the child's conduct, in which case the board may exclude him. The child may also be excluded by statutory provisions not found in the School Acts, but

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<sup>38</sup>(1919) 46 O.L.R. 146, at p. 147.



in this case, the procedures laid down must be strictly followed.

Religious objection to certain school functions may not be cause for dismissal if the proper exemption is provided by statute.

The Courts maintain that in districts operating more than one school, the board, acting in good faith and in the best interests of the district, has the right to direct which school a child shall attend. It is not, however, in the absence of negligence, responsible for the loss of children's possessions at school.





## CHAPTER VII

### PUPIL TRANSPORTATION

Pupil transportation is particularly necessary in rural areas of Canada. The trend in recent decades to school district reorganization and enlargement, and the accompanying consolidation and centralization of schools, has tended to place schools more and more distant from the residences of children expected to attend them. Although such removal has occurred, the child's right to education has not been modified. Nor has the obligation of the child, his parents or his guardians been increased to ensure that the child may be able to realize his right. Rather, the burden has been placed upon the authorities, for the right to reduce the number of schools by centralization carries with it the obligation to provide added facilities so that the child, even if living at a distance, is not penalized.

When and under what circumstances may the school board provide transportation and properly add the expenditure to the normal cost of school operation and maintenance? When and under what circumstances is the board bound to provide transportation? If the board exercises a power to convey pupils, whether the power is mandatory or discretionary, what is the manner in which it is to be exercised? By assuming a responsibility for transporting pupils, the board also adds to the risk of injury which pupils may sustain. What then, is its responsibility for safety, and what are the liabilities with which it may be charged? These are some of the questions considered in this chapter.



## I. The Obligation to Provide Pupil Transportation

### Statutory Discretion

The Ontario case of Murray and Brighton Public School Trustees v. Northumberland and Durham<sup>1</sup> treats in some detail the question of the board's power to transport pupils and to include the cost in normal school expenditures.

Facts in the Case. Several years prior to the action reported here, the Brighton Public School Board had established a continuation school at Wooler in the Township of Murray. Among the pupils attending the school were a number who came from the united counties of Northumberland and Durham. By statute, these counties were required to share the cost of operation of the school in proportion to the number of pupils they sent to it. In 1937 the Brighton board decided to provide transportation for pupils, including those living in the two counties, and the board demanded payment for such transportation as part of the cost of educating the pupils. The counties disclaimed all responsibility maintaining that the board had no power to transport, but in any event, transportation could not be charged as part of the cost of education.

Mr. Justice Green of the Ontario Supreme Court dismissed the board's action to compel payment by the counties, on the ground that the school corporation had no power to operate beyond its boundaries without express

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<sup>1</sup>(1939) O.W.N. 565, (1939) 4 D.L.R. 736, reversed (1940) 2 D.L.R. 28 which was affirmed (1941) S.C.R. 204, 2 D.L.R. 273.



statutory authority to do so. The Continuation Schools Act, under which the board operated, did not confer such authority. The board appealed his judgment.

Issues Before the Appeal Court. There were two main questions which the Appeal Court had to consider:

- (1) Did the school board have power to transport county pupils?
- (2) If it did have this power, was the cost of transportation part of the "cost of education"?

Issue I: By The Continuation Schools Act, either a public or separate school board could establish a continuation school. Because the Act made no provision for pupil transportation, the Court held that it was necessary to refer to The Public Schools Act and The High Schools Act. According to the former, transportation could be provided where pupils came from two or more districts and costs were to be shared by the districts. Not only could a public school board provide transportation for pupils from another district, but, the Court held, those pupils were the ones most likely to need it. The High Schools Act also empowered boards to provide transportation and to requisition for the costs incurred thereby. Said Robertson, C.J.O.:

Having therefore, concluded that S. 94 of The Public Schools Act gives the public school board power to provide transportation for pupils who reside outside the school section as well as for those within it, it would seem to follow that such a (continuation school) board has a similar power in respect of pupils attending a continuation school, and may transport pupils who reside outside the school section and who are county pupils.<sup>2</sup>

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<sup>2</sup>(1940) 2 D.L.R. 28, at p. 32.





Transportation was, by statute, at the discretion of the trustees who were entitled to say whether or not it would be provided, and if provided how its form and extent were to be regulated. The Court found that of the pupils attending the continuation school, twenty-five were local and fifty were from the counties. Since pupils were all being paid for at the same rate, county pupils were equitably entitled to the same services and consideration in respect of transportation as were the local pupils.

Masten, J.A., agreeing with the Chief Justice, said:

As has already been indicated, the extent to which that board will provide transportation of pupils rests in the discretion of the board itself, and they might determine that no transportation of any pupil should be provided, or they might provide transportation for certain county pupils, but conclude that some of the county pupils desiring to attend were too far away to warrant the expense of sending for them.

It is axiomatic that a school cannot be maintained without pupils. You can build a school house and hire teachers, but unless you get pupils you cannot maintain a school. They are as essential to the maintenance of a school as the school house or teacher. The size and equipment of the school house; the number of teachers and their employment or salary are matters resting in the discretion of the board.

In exactly the same way the number of pupils necessary to maintain a proper continuation school and how and where to secure them, is a matter resting in the discretion of the board as part of their duty of maintaining the school. If there are not enough local pupils in the school section to warrant a continuation school, then it can be maintained only by bringing in county pupils, and the cost of bringing them in is part of the maintenance of the school...<sup>3</sup>

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<sup>3</sup>Ibid., at pp. 37-38.



Issue II: The Act specified that expenditures for the maintenance

of the school, for permanent improvements, for payments to a sinking fund and for payment of principal and interest on debentures were to be included in annual requisitions. The Court held that transportation could come under maintenance. Though the definition of maintenance did not include transportation, the meaning of the words could be stretched to do so. In The Public Schools Act conveyance was regarded as "an expense to be included in the estimates for the current year." This could be applied to the continuation school board, since in other Acts transportation was considered as an ordinary expense to be dealt with as part of the cost of education or of maintaining the school. The Court maintained that had the legislature intended something else, it would have used specific language to say so. The equitable way was to charge the counties with the expense of transporting county pupils as the board was doing.

The Court also pointed out that transportation of pupils at public expense was becoming so common that lack of conveyance was being used as an excuse for non-attendance. Regular school attendance was held to be important, and furthermore, to make compulsory attendance a reality, transportation might be required. Since both The Public Schools Act and The High Schools Act provided for it, the expense of conveying county pupils to a continuation school was properly incurred and properly included as part of the cost of education. The judgment was upheld by the Supreme Court of Canada.



Masten, J.A., aptly summarized the situation by saying:

All taxation is confiscatory in its essence, but such confiscation is said to be justified on the assumption that the proceeds are to be expended for the general benefit of the community taxed...While the appellant board does not levy the tax in question on the rate-payers, yet it is entitled to requisition on the respondent (county councils) the expenditure incurred by it in the education of county pupils, and the county council is bound to raise the sum so demanded to the extent that it is within the authority conferred by the statute...The question arises, has the Legislature clearly and unequivocally conferred on these local school trustees that extraordinary authority over the citizens of the United Counties of Northumberland and Durham? If the Legislature has done so, that is the end of the matter and this Court must declare accordingly.<sup>4</sup>

When the statute imposes a duty to convey pupils to and from school, there is little question as to how the expenses incurred shall be met. Nor is the whole matter of pupil transportation questioned in most areas today. It has become almost completely accepted as part of school operation. However, when instead of a statutory duty to convey pupils, there is a discretionary power to do so, a school board may hesitate to provide the additional service. Though it may not be compelled to exercise a discretionary power, if the board does so of its own volition, the implication is that it has all the other powers necessary to carry out its intention. These implied powers include the power to obtain the necessary finances in the usual way. According to the Courts, the cost of pupil conveyance is part of the whole cost of school operation.

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<sup>4</sup>Ibid., at p. 35.





### Statutory Mandate

Under some circumstances the school board has no discretion in whether or not to provide pupil conveyance; the statute imposes a mandate on it to do so. Thus in Quebec, in 1959, children seven to twelve years old, living 2.37 miles from the school were held to be distant in the sense of Sec. 94 of The Education Act<sup>5</sup> and had to be conveyed to school. Where commissioners had combined several districts, they had power to make arrangements to carry children to and from school. Having passed a resolution making such arrangements, they must transport children, and could not force a parent to accept an alternative arrangement.<sup>6</sup> Similar provisions of the statutes are to be found in most other provinces, laying a duty upon boards to convey pupils to school when they live an excessively long distance away. Alternatively boards may be permitted to make other arrangements such as paying a boarding allowance in lieu of transporting children who live in isolated or remote areas.

### Laying Out Bus Routes

Under a mandatory obligation to provide transportation the board is still permitted a measure of discretion in the routes which it lays out. A Manitoba case, R. v. Oak Bluff School District<sup>7</sup> discusses the

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<sup>5</sup>R.S.Q. 1941, c. 59.

<sup>6</sup>Longval v. Commissaires d'Ecoles Pour St. Zenon (1959) R.L.245.

<sup>7</sup>(1937) 2 W.W.R. 636, 45 Man. R. 412, (1937) 3 D.L.R. 500 affirmed (1937) 3 W.W.R. 352, 45 Man. R. 418, 4 D.L.R. 368.



matter in some detail. This was an application to the Court for a mandamus compelling the board to provide conveyance.

Sec. 47 of The Public Schools Act<sup>8</sup> conferred on the council of a rural municipality the power to combine school districts by passing a by-law. By Sec. 48, such a combined district was unrestricted as to area, if the council provided, again by by-law, that the trustees must make suitable arrangements for conveying pupils living more than one mile from school. In this case council had formed the combined district and had directed the trustees to provide the necessary transportation for pupils. This by-law had been approved by the department of education and therefore, was binding on the trustees. Accordingly they had arranged six van routes for the greatest convenience of all concerned. Evidence showed that of thirty homes served, twenty were on the routes, three were less than one-quarter mile away, six were about one-third of a mile away and one was a half mile distant. Applicant's home was about one-third of a mile from the route, but he maintained that according to the Act, because he was more than one mile from the school, the school van should transport his children right from his home. The problem of the Court was to establish the meaning of the phrase in the Act: "to and from school".

Dysart, J., held that it should not be construed too literally. The spirit rather than the letter of the law should be observed. Trustees were bound to supply transportation which was reasonably adequate taking due consideration of road conditions, weather and

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<sup>8</sup>R.S.M. 1930, c. 34, Part II.



safety of the children. Very young and sickly children should be given special attention. The board had done all this, and the Court refused to interfere in its judgment in laying out its transportation routes.

The board's discretion was also spelled out in a Quebec case.<sup>9</sup> The Education Act provided that no district could be more than five miles by five miles in extent unless transportation was provided. The board had combined three former districts making provision for transportation necessary. Buses had been provided, but they did not pick up all children at their homes. Plaintiff who lived six miles from the school initiated action to compel the board to have his children transported from home.

The Court held that in a five by five school district, some children would have to walk more than two miles to get to school and yet there was no obligation to convey them. Thus it would be reasonable to expect children in a larger district to walk at least some distance. The Act must be read as giving the commissioners some discretion in laying out the routes; otherwise an undue hardship would be placed on them. Since plaintiff lived only one mile from the point of pickup, the board was fulfilling its obligation to him.

As with the direction of which school a child shall attend, the board has discretion in how it will organize pupil transportation. Even when there is a statutory mandate to provide conveyance, the phrase "to and from school" is not construed by the Courts to mean

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<sup>9</sup>Patrick v. Melbourne Protestant School Commissioners  
(1945) Que. S.C. 239.





necessarily from the pupil's home. In the absence of specific direction by the legislature, the board is permitted to make reasonable arrangements, and the Courts do not interfere with such arrangements.

## II. Discrimination in Conveyance

As was shown in Chapter V, the school board may not discriminate against any child within its jurisdiction in providing school accommodation and instruction. It may not do so in transporting children either. In Ridings v. Elmhurst School Trustees it was held that since the board had decided to transport some of the children in the district to the neighboring school district, it could not exclude other children from such an arrangement merely because they lived in an isolated part of the district.

An even more pertinent case is R. v. Green.<sup>10</sup> Evidence showed that children of one Wells had been conveyed to school up to April 22, 1922, after which the van driver made them walk. Under the Act, the board was obligated to convey children who would have to walk more than one mile to school. In Court the board indicated that the distance was two feet less than one mile, as measured from the gate of the school yard to Wells' gate, and therefore, the board had no obligation to convey the Wells children.

Evidence also showed that one of the trustees had lost an election for the office of reeve of the municipality, to the candidate supported by Wells. Following the election, plaintiff's

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<sup>10</sup>23 W.L.R. 264, 10 D.L.R. 111 (Man.).



children were no longer carried in the van.

Mr. Justice MacDonald held that the refusal to convey the children was motivated by ill-will and amounted to refusal to carry out the spirit of the Act. He said:

These defendants contend that Wells is two feet short of one mile from the school and because of this shortage of two feet they refuse to concede to his children the privileges extended by the Act. I cannot conceive men of reason, actuated by any motive other than resentment and bad humor stooping to such smallness. But as a matter of fact, the children of Wells would have to walk more than a mile from their home to the school; the contention of the defendants is that in a measurement of the distance from the school to the van route opposite the Wells home, the distance between house and road should not be counted, nor yet the distance from the school gate into the school building. Those distances omitted make the two feet short of a mile, but I cannot understand why those distances should be omitted. The wording of the Act is plain: "all pupils who would have farther than one mile to walk in order to reach school." How are the children going to get from their home to the van route? Surely that distance must be taken into account.<sup>11</sup>

In other words, if trustees wished to place a technical interpretation on the section, they must consider the section in its entirety. Discrimination cannot be permitted, for the statute extends the same rights to all children of school age, and therefore the board has the same obligation to all.

### III. Conduct of Drivers

Because trustees assume a grave responsibility for the safety of the children whom they transport to school, they must ensure that drivers are reliable. Their powers in this respect are illustrated by

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<sup>11</sup> 10 D.L.R. 111, at p. 112.



the Quebec case of Dundee School Commissioners v. Robbins.<sup>12</sup> This was an action for breach of contract.

The commissioners had made an agreement with Robbins to transport a number of school children in his car, over a three-year period. In the first year he carried out his duties adequately, but in the next year commissioners heard complaints of his intoxication and reckless driving on duty. They appointed a committee to investigate. On the report of the committee that there was some evidence of recklessness, the commissioners passed a resolution cancelling the contract.

The Superior Court held that this evidence was insufficient to cause termination of the contract without an appeal to a Court. The Appeal Court, however, held that the commissioners had no alternative but to break the contract and dispense with Robbins' services. In view of their great responsibility they would have failed in their duty by doing otherwise. Had they continued to employ Robbins, he might have continued to drive recklessly, endangering the lives of the children. In such a case commissioners were not obliged to wait for Court action, but could dissolve the contract by summary proceedings. If the driver failed to fulfil the implied conditions of the contract as to careful attention and sobriety at all times on duty, the commissioners were justified in considering the contract cancelled.

This case, although the only one of its kind found by the investigator, opens the whole question of the board's relations to

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<sup>12</sup>(1939) 67 Que. K. B. 288.





school bus operators. Although the Courts have not had occasion to rule on the qualification, licensing and general conduct of drivers, it may be implied from the judgment in Dundee School Commissioners v. Robbins, that they would support the board in its strict enforcement of all regulations designed to increase the safety and convenience of children. Since, as was shown in McLeod v. Salmon Arm School Trustees, the interests of children are paramount, the operation of school conveyance must also contribute to promoting their interests.

Furthermore, it is mainly by exercising due care that the board protects itself from liability for negligence in performing its duty. Because children are involved, school transportation must be carried out with more than an ordinary degree of care, and the board is justified in insisting on high standards of conduct and skill from its drivers.

#### IV. Accidents in Pupil Conveyance

##### The Cochrane Case.

In case of accident, the school board may be liable if negligence is proved. This was held in the Manitoba case Cochrane v. Elgin Consolidated School District,<sup>13</sup> the accident involving a horse-drawn van on a sleigh. While going over a deep snow drift in the plaintiff's yard, the sleigh skidded from the beaten track and the vehicle tipped over. One of the pupils, the plaintiff Norma Cochrane, sustained a broken arm.

The Trial Court found ample evidence of negligence. The sleigh

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<sup>13</sup>(1934) 2 W.W.R. 409, 42 Man. R. 257, affirming 2 W.W.R. 154.



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was old and in disrepair, but mainly it was too narrow and too easily upset. The front window of the van was too small to give the driver a proper view of the road. Further, the speed (the horses were trotting) was excessive for the condition of the road, and because of the condition of the yard, the driver was negligent in even entering it.

The board attempted to escape liability by showing that the driver was an independent contractor. The Court held, however, quoting 27 Halsbury (2nd. ed.) at page 486, that the board could not do so.

Where a person employs another to do work which does, or in the natural course of things will, involve or result in a duty on the employer either towards the community or towards a third party, the employer cannot escape that duty by employing someone else to perform it, however competent that person may be, even though that person is an independent contractor and has agreed to assume the whole responsibility.

Total damages of \$526 were assessed and the board appealed.

The appeal was dismissed, for by Sec. 63(2) of The Public Schools Act,<sup>14</sup> the duty to provide conveyance was imperative for the board of a union school district. The Court held that where the duty is optional, the board may protect itself by assigning the duty to an independent contractor; but where it is imperative, the board cannot delegate its responsibility.

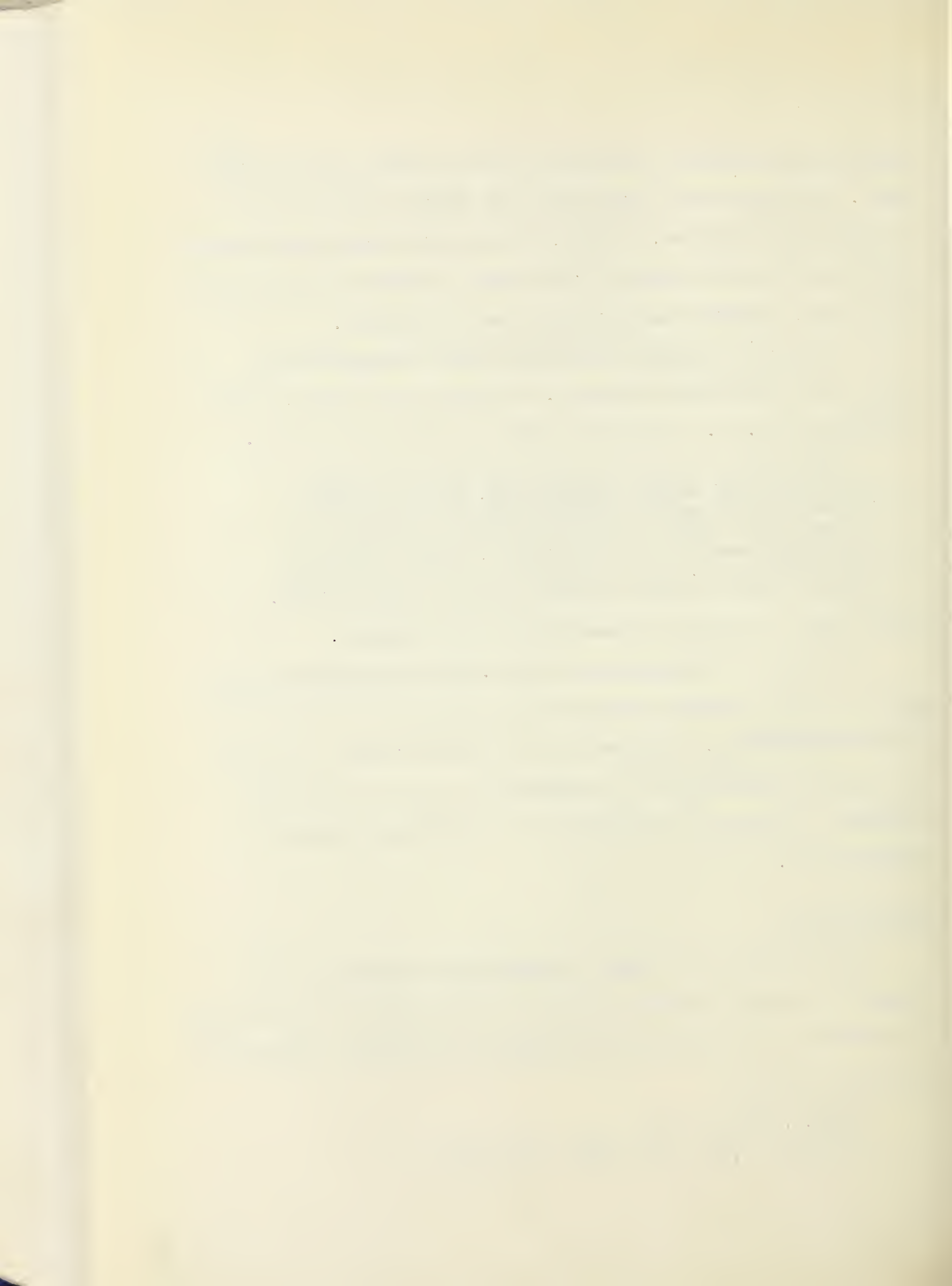
### The Tyler Case

A Saskatchewan case, Tyler v. Ardrath School Trustees,<sup>15</sup> was decided on a somewhat different principle of law, namely the responsibility of the board for the actions of its servant, the van-driver. The accident

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<sup>14</sup>R.S.M. 1930, c. 34.

<sup>15</sup>(1935) 1 W.W.R. 337, (1935) 2 D.L.R. 814.



resulted from the use of a faulty harness article and an unreliable horse. Because a bridle strap broke and became unfastened, the horses ran away. The van hurtled into a ditch and upset. A boy of twelve suffered a broken arm which ultimately required an operation to set the bone properly.

Negligence of the driver was easily established. The use of faulty harness and an unreliable horse were held to be a combination a prudent man would not use. The driver had failed to exercise reasonable foresight and through his negligence had caused the accident. However, were the trustees liable?

They argued that the driver was an independent contractor. Furthermore, although The School Act gave the board the power to provide transportation, it did not impose the duty to do so. The Court held, however, that the driver was not an independent contractor, but in reality a servant of the board. He received his directions from the board, and although there was a written contract, the board did not give the driver discretion as to how to carry out his duties.

Taylor, J., said:

...The ultimate responsibility for the conveyance of scholars to school in the system adopted must fall on the school board. It controls the purse and provides the expense and has such a control and discretion in exercising that control that it completely dominates every feature of the work, the standard of which will undoubtedly depend upon the amount of remuneration provided. The board dictates in its entirety the extent of the control it reserves to itself and what control and license in execution may be exercised by the driver. In some cases it may be expedient to trust the driver more than in other cases. In any case, no matter to what extent the driver be trusted and reliance placed on his discretion, he remains the servant of the board.<sup>16</sup>

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<sup>16</sup>(1935) 1 W.W.R. 337, at pp. 343-44.





Comparison of the Two Cases. The Cochrane case turned upon the point that the board had a statutory duty to perform. Even if an independent contractor is employed to perform such a duty, a school board cannot escape the liability which results from the negligence of the contractor. In the Tyler case the material facts were different. The duty was a discretionary one, which the board might have assigned to an independent contractor and thereby would have escaped liability for his negligence. By exercising close control over the driver, however, it did not permit him to perform as an independent contractor but rather as a servant of the board. The board is, of course, responsible for the negligent acts of its servants, performed in the course of the board's business.

No new principle regarding the liability of the board in a school bus accident was established by Sleeman v. Foothills School Division.<sup>17</sup> However, one point in the judgment is interesting and important.

The action was one for damages for injuries to a child, sustained in a collision between a school bus and a farm truck loaded with wheat. The Court held both drivers to have been negligent, in that they both approached a "blind" intersection of which they knew, at an excessive speed, and collided in the intersection. The school bus was overturned and the child, partly thrown out of the bus, was pinned underneath and severely injured. Damages totalling \$5,539 were assessed equally against the two drivers, the school board and the farmer who owned the truck.

The basis of the board's liability was two-fold. First, it had

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<sup>17</sup>(1946) 1 W.W.R. 145 (Alta.)



the statutory duty to provide transportation and therefore the decision proceeded on the same reasoning as that in Cochrane v. Elgin Consolidated School District. Even if this had not been sufficient, the driver of the bus was not, in fact, an independent contractor but a servant of the board and therefore the board was liable for his act.

However, because it was the negligence of the driver that caused the school board to be liable, the Court directed that the board was entitled, on the cross claim against the driver, to have contribution from him for any sums that the board was required to pay.

#### Master and Servant, or Independent Contractor.<sup>18</sup>

At this point, by way of clarification, it may be well to consider the meaning and legal implications of the master and servant relationship and also the relation of an employer to an independent contractor, in matters of tort liability. At law, an employer may be liable for the negligent acts of his servant, and in some circumstances for those of an independent contractor. Though they are discussed here in relation to school conveyance, general principles will be seen to apply much more broadly. Two situations are of particular interest to school boards:

- (1) There is a master-servant relationship involving the performance of duties imposed by statute, or duties which arise from the exercise of a discretionary power;

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<sup>18</sup>For a complete discussion see 25 Halsbury, Op. Cit., pp. 447-561.



- (2) There is an independent contractor relationship involving the exercise of either mandatory or discretionary powers.

The master-servant relationship exists when, under a contract of service, a person undertakes to serve another and obey all reasonable orders within the scope of the duty undertaken. It involves the power of the employer not only to direct what work is to be done, but also the manner in which it is to be done. The relationship differs from that of principal and agent in that in the latter the principal may direct what work is to be done but not how the agent shall do it. An agent is not subject to direction as to how much time he shall devote to the work of the principal, whereas a servant is subject to this direction. The relation also differs from that with an independent contractor in that the latter is not bound to obey the orders which his employer may give from time to time, but is free to act as he thinks fit within the terms of the contract. When an employer engages an independent contractor, and interferes in his work by directing how it shall be done, the relationship ceases to be that of an independent contractor and becomes that of a servant.

Liability for Negligence of a Servant. In general, a master is responsible for the acts committed by a servant in the course and within the scope of his employment. When a servant performs acts clearly authorized for him by the nature of his employment, and does so with lack of care or skill, causing injury to another person, the master is liable as though he had caused the injury himself. This is true whether the act was done under a statutory mandate or in the exercise of a discretionary power.





When the master of a servant is a corporation, the identification of the master with the acts of the servant is much closer than where the master is an individual, for the corporation is incapable of doing any act by itself. It can act only by availing itself of the services of others. However, the liability of the corporation is governed by the same general principles as is the liability of an individual master, though there is one further limitation. No servant can bind the corporation to an act which is ultra vires the corporation. Thus, the corporation cannot be held liable if its servant commits an act which could not under any circumstances have been done by the corporation. But the corporation cannot escape liability for other acts committed by its servants within the scope of their authority and in the course of their employment on behalf of the corporation.

As in Sleeman v. Foothills School Division, a master may be entitled to recover from a servant for whose tortious act he has been held liable, to the extent of damages and costs which have been assessed. Where a servant is engaged because he professed skill to perform certain duties, it is implied that he will perform them with reasonable care. If he commits a breach of care, and the master is held liable, the latter may recover in a suit for breach of contract, or alternatively, he may take proceedings under statutory provisions relating to contribution between joint tortfeasors.

Liability for the Acts of an Independent Contractor. This relation does not give rise to the same liability of the employer as does the relation between master and servant, for a contractor is regarded as a person carrying on an independent business. To establish whether a



person is truly an independent contractor, the following test may be applied. If the employer retains the power not only of directing what work shall be done, but also of controlling the manner in which it is done, there is a master-servant relation. If a person can be directed or overseen in doing his work, he is not an independent contractor.

In general, the employer is not liable for the torts of an independent contractor, nor for the torts of the contractor's servants. However, an employer who personally interferes with the work of the contractor or his servants, and in fact directs the manner in which the work is done, places himself in the position of a master and therefore becomes liable for any injury to a third person sustained while the contractor is carrying out the employer's directions.

The above principles apply particularly to the situation where the employer exercises discretionary powers. Thus a school board carrying out discretionary duties, may escape liability by employing an independent contractor. Where the employer is under a statutory obligation to perform a particular duty, he cannot escape liability for the negligent performance of the duty even by employing an independent contractor.

Summary. Thus, the employer is responsible for all acts committed by a servant acting in the course of his employment. He is not liable for torts committed by an independent contractor in performance of a discretionary act, but may, by his personal interference, or the interference of his agents, place himself into the position of a master and thereby make himself liable. Where the duty is mandatory, the employer



cannot escape liability by assigning it to an independent contractor. <sup>241</sup>

### The Baldwin Case

Because it is a very recent case dealing with pupil transportation in a modern situation and because it serves to illustrate some of the principles discussed above, the case of Baldwin v. Lyons and Erin District High School Board<sup>19</sup> is considered here in greater detail than were the others. This was an Ontario case, an action for damages for injuries suffered by three high school pupils as a result of a collision between a school bus and a train.

Facts in the Case. Lyons was the owner of three school buses under contract to the Erin High School Board. One bus was driven by Lyons, himself, and the others by his servants. One of the latter, named Leitch, was involved in the accident. The board, though not obligated by statute to provide pupil transportation, had engaged Lyons to do so under its discretionary powers.

On the day of the accident, January 28, 1960, the weather was clear. Although the road was covered with three or four inches of hard-packed snow, it had been sanded, and driving conditions were good. As the school bus, driven by Leitch, approached the railway crossing in the town, it stopped some 200 feet away to discharge a passenger. Then it proceeded slowly but did not stop before entering the crossing, where it was rammed by a train. The locomotive's lights were on and its whistle blowing. Leitch and several students were killed and others were injured more or less seriously.

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<sup>19</sup>(1961) 26 D.L.R. 437.





The evidence showed that as the bus entered the crossing one of the pupils was standing in the door well, though there was room for him to sit. This may have obscured the driver's vision, and at all events, was a breach of statutory provision.

Leitch was found to have been guilty of negligence. He had failed to require the pupil in the door well to be seated as required by The Public Vehicles Act. He had failed to keep a proper lookout. The train was visible long before he reached the crossing, and had he opened the door to listen, as he should have done, he would have heard the whistle. He had also failed to keep the vehicle under control where it was easy to do so, in order to stop before entering the intersection.

The Argument. Plaintiff's contended that both Lyons and Leitch were servants of the board and that therefore the maxim respondent superior applied to make the board liable for damages incurred by Leitch, the driver. Under the conditions of employment Lyons was not truly an independent contractor and the board was liable for his negligence and that of his servant.

The board countered that it was not under statutory duty to provide transportation, but had done so through the employment of an independent contractor, Lyons, who was acting by virtue of a written contract. Therefore, the board was not liable for the negligence of Lyons' servant, Leitch.

The Judgment. Although there was a written contract between Lyons and the board, there was evidence that both the school board and the principal of the school gave frequent directions to Lyons



and his drivers, as to the manner in which they should operate the buses. For example, it was the board which made regulations regarding smoking, swearing and rough conduct on the buses. When complaints came to the board, it made new regulations and gave them to Lyons to transmit to his drivers. For instance, the board had forbidden drivers to pick up students anywhere except at school when going home. Bus routes and changes in routes were planned by the board and Lyons was required to follow them.

Under these circumstances it could not be held that Lyons was an independent contractor. Rather, he and his drivers were servants of the board by virtue of the constant direction of the manner in which they were to do their work. Thus the maxim respondeat superior did apply and made the board liable for the negligence of Leitch.

This case does not fall in the class where there is a statutory obligation to provide transportation. Had this been so, there would have been no question of the board's liability, whether Lyons was an independent contractor or not. If the board had succeeded in establishing Lyons as an independent contractor, the case against it would probably have been dismissed. However, it did not do so, and so was held liable. Judgment was against both Lyons and the board for a total of \$52,282 plus costs.

#### V. Summary

Providing transportation may be a statutory duty or it may be at the discretion of the board. However, when it is legitimately provided, the costs of school conveyance are held to be part of the "cost of



education." Whether provision of transportation is mandatory or discretionary, the Courts have held that the board has the right to lay out bus routes as long as it acts in good faith and in the best interests of the children and parents concerned. The Courts do not tolerate discrimination against children in the manner of providing conveyance, but they do not require boards to go to unreasonable lengths to pick up children at their homes.

School boards have every right to expect bus drivers to give careful attention to their work and to be sober at all times on duty. If the driver fails to observe such conditions, it has been held that the board is justified in dissolving its contract with him by summary proceedings.

In cases of accident in pupil conveyance, a number of considerations are pertinent. If the board has a statutory obligation to provide conveyance, it cannot escape liability for accidents caused by negligence, whether by its own servants or by an independent contractor whom it employs to perform the duty. When provision of transportation is at the discretion of the board, the duty may be delegated to an independent contractor. In this case the board may not be held liable for negligence in case of accident, but the burden of proving that it has indeed employed an independent contractor to perform the discretionary duty is on the board. The board is, however, responsible for the negligence of its own servants, even when there is only a discretionary power which is being exercised.





## CHAPTER VIII

### SCHOOL PREMISES

The powers and duties of school boards regarding the selection, acquisition and change of school sites are laid down in the school statutes. The amount of dispute arising from matters related to sites is apparently proportional to the complexity of the procedures laid down. Thus, in those provinces where procedures are vested in the board, subject only to the approval of the Minister, few disputes reach the Courts. However, in provinces, as in Ontario, where statutory provisions require approval of the board's selection by ratepayers, and in case of disagreement provide for arbitration of the dispute, the Courts may be called upon frequently to rule whether the statutory procedures have been followed, and whether the action taken is, therefore, lawful and binding. Thus, an examination of litigation regarding selection, acquisition and change of school sites reveals that in western provinces very little disagreement has come before the Courts, whereas numerous cases have come before the Ontario Courts.

A further observation may be made. Litigation involving school sites was more common some years ago than it is today. It is suggested that one of the primary reasons for this is that present trends toward larger school districts have removed the schools from local proximity, and ratepayers are no longer so intimately involved. Furthermore, the general provision of school conveyance has largely removed the necessity for locating schools so that pupils would have



the least possible distance to walk. It is suggested also that the rural school is no longer the community centre which it once was. All these factors considered, the location of the school today is not a critical question and hence not a subject of spirited disagreement.

It may also be observed that building codes, regulations and standards today are such that the quality of school buildings seldom becomes the subject of litigation. Lighting, heating, ventilation, comfort, cleanliness and sanitary facilities are rarely criticized before the Courts. In fact, no cases dealing with these matters were found. The conclusion reached by the writer is that buildings have been appropriate and acceptable to the times in which they existed. The standards have changed with general social change and public demand, but at any particular time and place buildings have been more or less acceptable.

One aspect regarding school premises remains a live issue, namely the matter of compulsory acquisition of land by expropriation. All school legislation makes provision by which boards may acquire property in this manner. However, because expropriation deprives individuals of some of their property rights, the Courts insist that boards follow precisely the provisions of the statute, which are strictly enforced. It is held that the intention of the legislature must not be exceeded in the exercise of such an extraordinary power.

In this chapter the following topics are examined:

- (1) The provision of some of the statutes regarding the acquisition of school sites;
- (2) Cases in which dispute arose over selection of a site;



- (3) Cases in which dispute arose over change of the site;
- (4) Cases involving expropriation proceedings;
- (5) Miscellaneous cases related to other matters pertaining to school premises.

The many other factors related to the board's acquisition and ownership of property are not considered in this chapter. Some of them have been touched upon in earlier chapters, but they are omitted chiefly because they have not been before the Courts.

### I. Statutory Provisions Regarding School Sites

Statutes providing for the location of school sites fall into two broad classifications. The first group vests trustees with the power of selection, which selection may or may not require approval of the Minister or some other official of the central authority. The second group of statutes requires trustees to make the selection and then to submit it to the ratepayers or municipal council for approval. These latter Acts provide further for arbitration procedures in case of dispute between the board and ratepayers or council, as the case may be.

The provisions of the first group are clear and precise, leaving very little room for interpretation and hence for dispute. It becomes simply a matter of making a selection and seeking the necessary approval. If approval is not given, another selection must be made. The provisions of the second group are more extensive and therefore open to more interpretation. The constitution of the arbitration board, the method of selection of arbitrators, the procedure of the





arbitrators, and their ruling--all must follow the provisions of the statute, and an oversight or error at any point may be challenged.

The following quotations are representative of the provisions of the first class of provincial statutes:

Each board of trustees shall:

...Determine the site of the school house...and acquire land or additional land where necessary for school grounds, subject to the sanction of the Supervisor as to both the nature and size of the proposed site and its location with respect to the area to be served thereby.<sup>1</sup>

It shall be the duty of the school boards in each municipality to select and acquire the land necessary for school sites...<sup>2</sup>

In a division, the board may acquire a site or an addition to a site for a school building at such point either within or without the division as may be approved by the minister.

In a non-divisional town or city district the board may select and acquire such sites for school buildings either within or without the district as it deems desirable and may select and acquire additions to existing sites.<sup>3</sup>

For purposes of comparison the following section is given as representative of the second group of statutes indicated above:

(1) Whenever it is deemed expedient by or it is the duty of a rural school board to erect a new school building, or to change the site of an existing school-house, or where a petition in that behalf is presented

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<sup>1</sup>The School Act, R.S.P.E.I. 1951, C. 145, s. 46(6).

<sup>2</sup>The Education Act, R.S.Q. 1941, C. 59, s. 236(3).

<sup>3</sup>The School Act, (Alta.) 1957, C. 297, Ss. 212(2), 213.



by twenty-five per cent of the ratepayers of the school section, the board shall select a school site and shall thereupon call a special meeting of the ratepayers to consider the site selected by the board, whether it be the present site or a new site, and if a majority of the ratepayers present at the meeting by resolution approve of it, the site shall be adopted by the board and no site shall be adopted by the board until so approved, except as provided in subsections 2, 3 and 4.

(2) In case a majority of the ratepayers present at the special meeting differ from the board as to the suitability of the site selected by it, each party shall then and there choose an arbitrator, and the inspector or, in case of his inability to act, any person appointed by him to act on his behalf, shall be a third arbitrator, and the three arbitrators or a majority of them present at any lawful meeting shall make and publish their award, and may, in and by the award, approve of the site selected by the board or may change the boundaries thereof or may select such other site as the arbitrators or the majority of them deem more suitable for the purpose.

(3) With the consent or at the request of the parties to the reference, the arbitrators, or a majority of them, shall have authority, within one month from the date of their award, to reconsider the award and within two months thereafter to make and publish a second award, which award, or the previous one, if not reconsidered by the arbitrators, shall be binding upon all parties concerned for at least five years from the date thereof; but if the boundaries of the section have been altered before any action has been taken by the board to purchase the site, proceedings under this section may be taken for the selection of a site as if no award had been made.

(4) If the board or the majority of the ratepayers present at a public school meeting neglect, or refuse, where there is a difference in regard to the selection of a school site, to appoint an arbitrator as provided by this Act, the inspector with the arbitrator appointed, shall meet and determine the matter, and the inspector in case of such refusal or neglect shall have a second or casting vote if he and the arbitrator appointed do not agree.<sup>4</sup>

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<sup>4</sup>The Public Schools Act, (Ont.) 1950, c. 316, s. 10.



## II. Selection and Change of School Sites

### Selection of Site

The procedures required for selection of a school site by rural school boards in Ontario and the difficulties which arise are illustrated in the following cases. All are based on legislation which was the forerunner of the section quoted above.

In Orr v. Ranney<sup>5</sup> two trustees without consulting the third, decided upon a site and had a school built. To pay for it, they assessed a rate and authorized its collection. Plaintiff, a ratepayer, refused to pay the levy on the grounds that the proceedings had been illegal. Upon his refusal, the collector seized some of his chattels, and he brought action. The Court held that not only could the two trustees not legally carry out the action which they had done, but the whole board, acting as a corporate body could not do so without first submitting the site to a meeting of the freeholders for approval.

Robinson, C.J., said:

The defendants have assumed that only two of three trustees could, as a majority, do any act, however important, without consulting the third or giving him any notice or opportunity of uniting with or opposing them. That is clearly not so. Then...the whole body of trustees were not competent, without any reference to the freeholders, to determine upon the site of the school house and purchase it and impose a rate for raising the money to meet the charges; and yet the plea proceeds on the assumption that the trustees, even a majority of them could, without any formality, do all that they judged it desirable to do.<sup>6</sup>

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<sup>5</sup>(1855) 12 U.C.Q.B. 377.

<sup>6</sup>Ibid., at p. 379.





In Coupland v. Nottawasaga School Trustees<sup>7</sup> the board, present at a ratepayers' meeting at which a school site was decided upon, raised no dissent. A year later, however, the trustees did object. The Court held that they should have raised their objections at the meeting. The legislation required this so that an arbitration board could be named without delay to settle the matter. Therefore, the trustees were prohibited from building on any site other than the one chosen by the meeting.

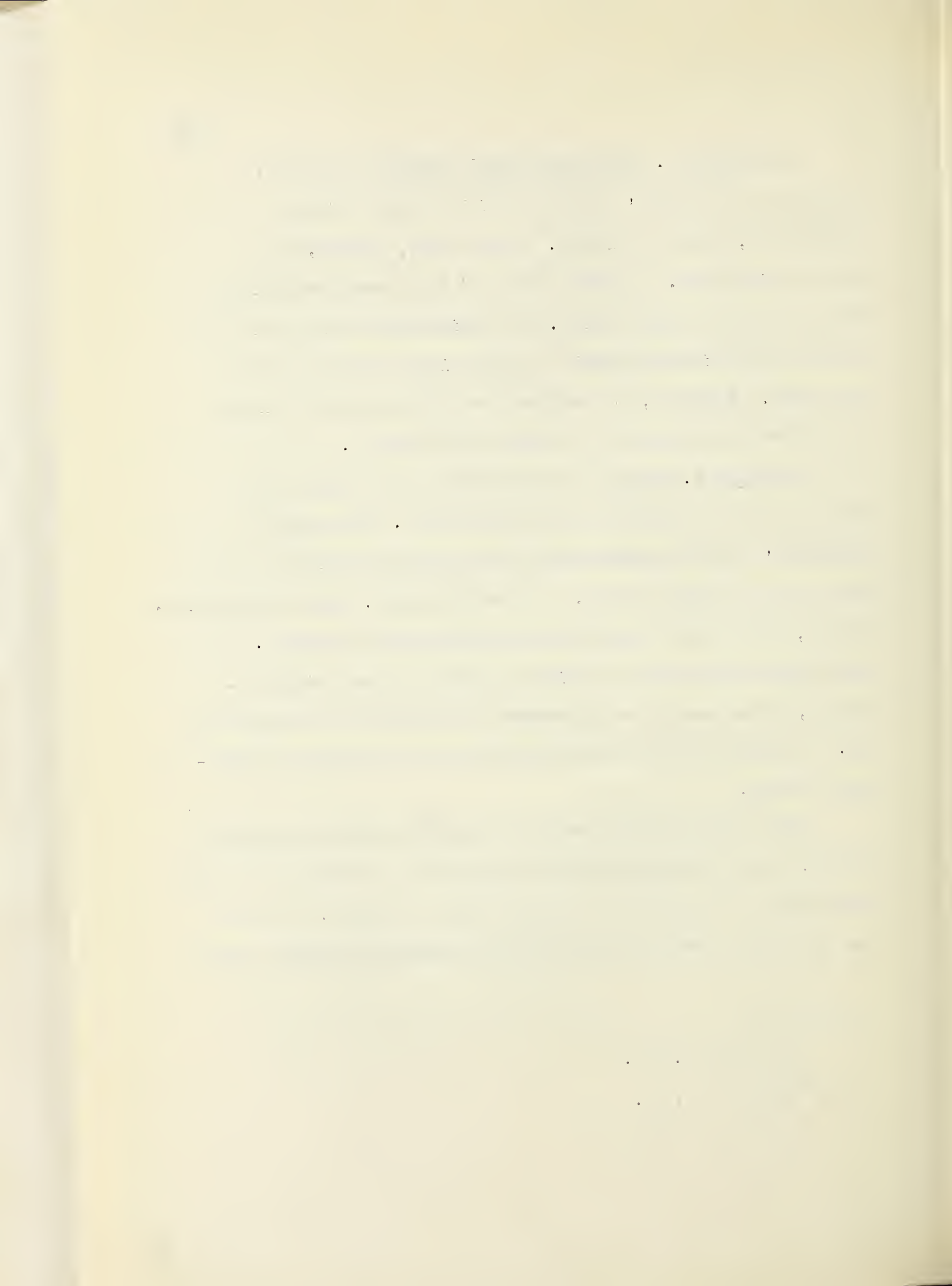
In Malcom v. Malcolm<sup>8</sup> trustees had received a grant for a grammar school building from the county council. They called a ratepayers' meeting proposing that the new school be built upon the site of the old public school. The meeting agreed. Upon investigation, however, it was found that the old site could not be enlarged. The board chose another site but this was rejected by the ratepayers. However, at the meeting no arbitrators were appointed as required by law. The Court held that arbitrators could be appointed at a subsequent meeting.

Upon occasion school boards and ratepayers become emotionally aroused, each party insisting upon doing what it considers to be right, and refusing to concede to or compromise with the other. In such a case the Courts have great difficulty in attempting to bring harmony

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<sup>7</sup>(1868) 15 Gr. 339.

<sup>8</sup>(1868) 15 Gr. 13.



into the situation. Such a situation led up to Re Sombra School Section.<sup>9</sup> The trustees had chosen a site but it was rejected by the ratepayers who proposed their own site. An arbitration board was chosen and the arbitrators rejected both suggestions, and made their own selection. The school board, dissatisfied, brought action maintaining that the arbitrators had exceeded their authority.

Meredith, C.J., agreeing with the board, said:

...It is obvious, I think, that the construction which I have felt myself compelled to place on the statute may make it very difficult where, as in this case, there is a bitter conflict between trustees and the majority of the ratepayers, to reach a conclusion which will enable the trustees to perform their statutory duty of providing adequate school accommodation for the children of the section; for if, as I think it was the duty of the arbitrators in this case, having come, as I assume they did, to the conclusion that the site selected by the trustees was not a suitable one, to have confined their award to so determining, it will be impossible to reach the point of adopting a site until the trustees and the majority of the ratepayers are of one mind, or the arbitrators appointed have reached the conclusion that some site selected by the trustees is a suitable one.<sup>10</sup>

The above case also points up the essential weakness of the legislation. When the disputing parties, the board and the ratepayers, obdurately refuse to compromise, the legislation is powerless to resolve the difficulty with despatch and the Courts can only insure that the statutory procedures are followed.

Even when the proper procedures have been followed in selection and preparation to acquire a site, the board may be challenged and

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<sup>9</sup>(1903) 6 O.L.R. 585.

<sup>10</sup>Ibid., at p. 587.



delayed. This was the case in Re McCormick and Colchester South.<sup>11</sup> The board had selected a site, which had been approved by the ratepayers. The trustees had then applied to the municipal council to pass a by-law for borrowing \$1,700 to purchase the site and erect a school house. This by-law was attacked by a ratepayer applying to have it quashed because, he alleged, it did not propose to rate all lands within the school section, and furthermore, had not been submitted to the ratepayers for approval. The Court found no evidence on the first objection, and ruled that the approval of the ratepayers was not necessary. The action was dismissed, but the board had been delayed in its efforts to provide school accommodation.

The difference between legislative provisions regarding selection and acquisition of school sites in Ontario and New Brunswick is illustrated in Meisner v. Meisner.<sup>12</sup> In this case, the building which had been used as a school was condemned by the authorities. A dispute arose over the location of the new school house, and the ratepayers, holding a meeting to deal with the dispute, voted to build on the old site. The school board, however, had selected a new site and had obtained the sanction of the inspector as provided by law. They built the school and prepared a rate for school purposes. Plaintiff resisted payment of the rate and when his chattels were seized, he brought this action for damages. He was not allowed

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<sup>11</sup>(1881) 46 U.C.Q.B. 65

<sup>12</sup>(1899) 2 N.B.R. 320.





to succeed, however, for the Court held that the board had complied with the necessary statutory provisions.

In selecting a new site, the school board in Saskatchewan may change its mind, provided only that it follows the proper procedures as shown in Carman v. Newton School Trustees.<sup>13</sup> The school board had properly selected a new school site and had obtained the approval of the municipal council as required. However, before acquiring and developing the site, the trustees began proceedings to have the old site approved for a new school. Plaintiff obtained an interim injunction to restrain them from continuing such proceedings, contending that since there had been no objection taken to the new site, the old one could not be approved. In dissolving the injunction the Court held that there was nothing irregular in the board's actions. Nor was the municipal council bound by its decision on the first site. The statute provided only that upon approval of a site by the council, the board could proceed with the erection of a building. The Court refused to rule on the relative merits of the two sites. That was a matter for the board and council to decide. The Court's concern must be confined to the regularity of the procedure they had followed.

Statutory provisions in Quebec also give the school board unfettered discretion as to the choice of site, provided only that their decision is made at a regularly constituted board meeting, and that it is published as required by law. In Pellerin v. Denis de Brompton School Commissioners,<sup>14</sup> it was held that commissioners were

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<sup>13</sup>(1921) 3 W.W.R. 347, 61 D.L.R. 58.

<sup>14</sup>(1945) R.L. 24.



not required to consult ratepayers regarding the location of a proposed school. Nor could the Courts interfere unless it was established that there had been abuse or injustice resulting from bad faith or oppressive use of power.

### Change of Site

Cases involving change of site are concerned primarily with interpreting the statutes, as were those on selection of a site. If the provisions of the Act are followed, the Courts refuse to interfere or to rule on the wisdom of the action taken by the trustees. Again, it might be noted that the more complex the statutory provisions, the more likely it is that disputes will arise.

In this section, only two cases are discussed. The first is a leading case from Ontario. Other Ontario cases add no new principles, but merely give further detailed interpretation of statute. The second, an Alberta case, is given by way of further comparison of statutory provisions and how they operate.

Williams v. Plympton School Trustees.<sup>15</sup> Defendant school trustees had concluded that the school house was inconveniently situated, and that because it was old and in disrepair, and because title to the present site was defective, the building should be replaced on a new site. Thus, in January, 1857, they called a meeting to consider a proposed site. The majority of the ratepayers present,

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<sup>15</sup>(1858) 7 U.C.C.P. 559.



were opposed to the change. A second meeting was called at a later date, and again the proposal was defeated. In the event of disagreement as to site, the statute<sup>16</sup> provided:

In case of difference as to site of a school between the majority of the trustees of a school section and a meeting called for that purpose, each party shall choose a party as arbitrator, and the two arbitrators thus chosen and the local superintendent, or any person appointed by him to act on his behalf, in case of his inability to attend, and a majority of them shall finally decide the matter.

At the second meeting the arbitrators were chosen and they decided against the change of site. The trustees, still dissatisfied, applied to the Chief Superintendent, who advised them to hold another meeting to reconsider the question. Sixteen persons attended the meeting, and a majority approved a change of site. Shortly after the close of the meeting, a majority of the ratepayers in the school section arrived and charged that the meeting had not been held at the time advertized. No further action was taken, however, in protest to the meeting.

The trustees contracted to erect a new building for £95 and about October 31 made a rate bill to raise money for payment. Plaintiff refused to pay the rate assessed against him, the collector seized his ox and he brought this action against the trustees.

The action raised the following questions:

- (1) Were the trustees empowered to build a new school house and impose and collect a rate without the prior sanction of a

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<sup>16</sup> 13 and 14 Vict. C. 48, s. 11.





special meeting for that purpose?

- (2) Was the notice of the last meeting a notice under which that meeting could decide the question?
- (3) Were the rate bill and warrant for seizure of plaintiff's ox sufficient in law?

The whole issue revolved about the power of the trustees to hold the last meeting and to act upon its decision. By law, the trustees could not change the site of the school house without calling a special meeting of the ratepayers. Also, if there was disagreement at the meeting, arbitrators were to be chosen and their decision was to be final.

In this case, arbitrators should have been chosen at the very first meeting. However, that oversight was corrected, even if the procedure was irregular, at the second meeting, and the arbitrators had given their decision. Since the decision was final and binding, trustees had no power afterward to refer the same question to another special meeting of the ratepayers. In other words, they had no power to appeal from an award which was to be final, to a meeting of the same kind that had already passed the question to the arbitrators to settle. The award of the arbitrators was valid and therefore any action which the board took, contrary to the award, was unlawful and void. The answer to each of the questions was, "No". The whole difficulty had arisen because the trustees had not followed the plain and clear directions of the statute.



Olstead v. Coal Valley School Trustees.<sup>17</sup> In this case trustees did follow the statutory provisions and thereby successfully resisted action against the school board. This was a motion by a school board to dissolve an order restraining trustees from moving a school building to a site which the board considered more suitable. Although the Act gave the board the power to select a site, with the approval of the Minister, plaintiff contended that once a site was chosen, the board's power to select was exhausted.

Walsh, J., held that this was not so. He said:

No reason suggests itself to me why it should be held that once a certain bit of land becomes the site for the school house of the district, that it and it alone must thereafter forever continue to be such a site. On the other hand, there are reasons why in human affairs a change may from time to time be necessary. One such is put forward by these defendants arising out of the fact that the present site is, because of recent changes made in the territorial limits of the district, most inconveniently placed, an inconvenience which the proposed removal is intended to and will entirely overcome.<sup>18</sup>

The Act neither expressed nor implied prohibition to moving the school building. Rather it mandated that the board must acquire a site. The board might also acquire more than one site, and had power to dispose of its property. In all these actions the only procedural requirement was to get the Minister's approval. This the board had done, and therefore it could not be prevented by a Court order from discharging its lawful powers and duties.

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<sup>17</sup>(1924) 1 W.W.R. 211 (Alta.).

<sup>18</sup>Ibid., at p. 212.



The two cases illustrate the principle that in relation to school sites, or change of sites, as in its other actions, the board is controlled by the provisions of the statute. Though these provisions may be complex or simple, the board can protect itself from legal action only by observing the requirements which are set out.

### III. Expropriation of Land for School Purposes

School Acts in all Canadian provinces make provision for the compulsory acquisition of land required for school purposes when such lands cannot be obtained by ordinary negotiation with the owner or when the trustees deem the price asked to be unreasonably high. Procedures for expropriation are given in detail in the various statutes, and the Courts enforce strict adherence to the procedures laid down by the legislatures, for this is interference with the property rights of an individual and such interference must remain strictly within the powers allotted by the legislature.

A school board may not be thwarted in the legitimate and lawful exercise of its power to expropriate. This principle was illustrated in Johnson v. Howard Public School Trustees.<sup>19</sup> Plaintiff was a tenant on lands which the board had unofficially chosen as a school site. Since the law provided that an orchard could not be expropriated, the owner quickly planted a number of fruit trees there.

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<sup>19</sup>(1879) 26 Gr. 204.





When the intention to use the land for school purposes was abandoned, the trees were allowed to decay, and many were plowed up. Only a few survived and these showed no evidence of cultivation.

Some years later, the board sent a committee directly to the owner of the property to negotiate for a site. He again became alarmed and again planted a number of trees. The board offered \$200 for the site but was refused, whereupon it initiated expropriation proceedings. The arbitrator whom it appointed--the owner refused to make an appointment--awarded the site for \$150, from which award the owner appealed to a Court, maintaining that the board could not expropriate an orchard.

The Court ruled that the land was not an orchard within the meaning of the statute. Therefore, had the board followed the proper procedure, it could have obtained title. Not having done so, however, it could not acquire the land. The arbitration board had not been properly appointed.

It is clear notwithstanding the final ruling of the Court, that had it followed the statutory procedure, the board could not have been prevented from lawfully taking the property for school purposes.

The strict construction of statutes dealing with expropriation procedures is illustrated in Re Roshko and Winnipeg School District,<sup>20</sup> which proceeded on Sec. 168 of The Public Schools Act.<sup>21</sup> The section

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<sup>20</sup>(1924) 3 W.W.R. 614, 4 D.L.R. 1017.

<sup>21</sup>R.S.M. 1913, C. 165.



read as follows:

When an owner refuses to sell property required for school purposes or demands therefore a price deemed by the trustees of any school district unreasonable, a caveat may be registered against such property by the school district, after a price is offered to the owner or his agent which the trustees consider is reasonable value, and immediately thereafter the trustees may take possession of the property for the purposes of the school district, and the owner shall be entitled to receive interest at the rate of six per cent per annum, based on the price finally determined upon by the arbitrators and reckoned from the date the caveat is filed.

The board notified Roshko as required and offered him \$4,200 for a certain piece of property. Roshko refused to sell and the board filed a caveat and arbitration followed. The award was for \$4,500, and was made in 1924 whereas the caveat had been filed in 1922. In the interim period Roshko had continued to receive profits and rents from the buildings concerned. Therefore, the board contended, it should not pay interest on the arbitration award.

The Court held otherwise. The statute gave the board the right of immediate entry to the property. That the board had not taken possession was immaterial. Because the statute interfered with the owner's right to dispose of the property as he saw fit, the legislature had intended that he should be compensated by being entitled to interest.

If the price asked for such property is deemed unreasonable, it might be asked how a reasonable amount is to be determined. The



question was discussed in Re Lennox and Toronto Board of Education.<sup>22</sup> Land, together with six dwellings, was expropriated by the board of education and three arbitrators were appointed to determine the value of the property taken by the board. The majority awarded the sum of \$22,260, but the third awarded \$29,700. On appeal the County Court Judge awarded \$27,060. Upon further appeal the Court applied the rule that "the value to be ascertained is the value to the seller of the property in its actual condition at the time of expropriation, with all its existing advantages and with all its possibilities excluding any advantages due to carrying out of the scheme for which the property is compulsorily acquired." Where expert witnesses give conflicting evidence of such value, neither the arbitrators nor the Court should try to arrive at the true result by "averaging witnesses" or by "splitting the difference."

Sometimes judgment hinges on the meaning of a single word in the statutory provisions. Thus, Sec. 135 of The Public Schools Act<sup>23</sup> in Manitoba read:

The trustees of any rural school district shall have the power to expropriate and acquire any land adjoining any existing school site which they may require for the enlargement thereof...

The case of McKenzie v. Miniota School District<sup>24</sup> clarified the meaning of the term "adjoining" as used in the section quoted above.

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<sup>22</sup>(1926) 58 O.L.R. 427.

<sup>23</sup>R. S. M. 1930, C. 34.

<sup>24</sup>(1931) 2 W.W.R. 105, 2 D.L.R. 695 (Man.).





The existing site, located in a village, was bounded on four sides by streets. Extension to three sides was impractical but plaintiff's land lay on the fourth side directly across the road and could be used for enlarging the site. However, being separated from the school site by a road, was it "adjoining land"?

The Court held that the word "adjoining" as applied to parcels of land, does not necessarily imply that they are in physical contact with each other. If premises are near each other, or neighboring, or easily reached, they may be said to be adjoining. Here the defendants, the school children and the teaching staff had the fullest possible freedom to enter upon the highway from the school site and from there to the borders of plaintiff's land. Disregarding the danger of permitting such use of the highway, there was free and full access from the school site to plaintiff's land and therefore it was considered to be "adjoining" within the meaning of the Act.

An interesting question is raised when a school board attempts to expropriate land occupied by another public corporation which also has powers of compulsory acquisition. Can such procedure be permitted in law? The question was answered in The Public Utilities Commission of the Town of Mimico v. The Lakeshore District Board of Education.<sup>25</sup>

The board in question proceeded in the proper manner to expropriate a portion of the commission's vacant land. Plaintiff commission, desiring to use the land for the erection of a power

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<sup>25</sup>(1954) O.W.N. 151.



transformer, applied for an injunction to restrain the school board. At the hearings the Court ruled that to permit two corporations, both with powers of expropriation, to exercise these powers upon one another would be contrary to the intent of the legislature. To do so could result in a series of cross-expropriations which would not be in the public interest. The power of expropriation must be limited to privately held lands.

#### IV. Miscellaneous Cases Relating to School Premises

##### Provision of Temporary Accommodation

It may be necessary at times for boards to provide temporary accommodation other than a school house. It is not uncommon for them to rent church facilities for such a purpose. Can rental so paid be considered to be unlawful support of a religious denomination? The Nova Scotia case of Thurgood v. Vigneau<sup>26</sup> treated such a situation.

At the annual school meeting the ratepayers passed a resolution authorizing the board to rent a room in a local convent to accommodate grades eleven and twelve. Before the opening of school, on the recommendation of the principal of the school, (she was also a sister in the convent) the board agreed to include grade ten with the other two grades in the convent. This was done for the

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26(1929) 4 D.L.R. 857.



sake of convenience and better instruction rather than because of serious overcrowding in the school house. Plaintiff, whose daughter was in grade ten, took her out of school and charged the board with failure to provide necessary school privileges. He also sought to prevent the board's making rental payments, which he alleged were illegal.

The Court held that the trustees had, in fact, provided the necessary school privileges. They had acted honestly and without exceeding their authority. Since they were permitted discretion in interpreting the meaning of the term "necessary", the Court held that it had no right to interfere as long as trustees were acting in good faith. The word "necessary" in the Act must be given a reasonable interpretation. It did not mean absolute physical necessity but should be read in terms of the aims sought by the Act, namely the proper advancement and education of children, under proper conditions. In this case, the changes, bought at small cost, added to the effectiveness of the school program. Therefore it was legal and necessary to rent the room for grades eleven and twelve.

Was it also legal to include grade ten with the others? The matter of organizing the school into proper instructional departments was held to be an internal one about which trustees knew little. They relied on the advice of the principal who knew the situation very well. The board had acted on good advice and the Court would not interfere.





The classroom in question was not sectarian, either in its decorations or in the teaching carried on there. Though plaintiff objected because the building belonged to the Roman Catholic Church, his case was insufficient. The board had acted in the best interests of the school children. The money spent on rental could not be considered an illegal expenditure.

#### Additions to existing School Buildings

Older school buildings in urban areas may be located in districts where local zoning by-laws and building regulations prohibit certain types of additions. Do such regulations apply to school buildings? A situation of this kind was dealt with in Syndics des Ecoles Protestantes d'Outremont.<sup>27</sup>

The school board owned a building some forty or fifty years old. In 1925 a city zoning by-law was passed prohibiting building of anything but detached or semi-detached cottages in the area. In 1937, the board, looking to the future when expanded accommodation would be necessary, acquired two adjoining lots. In 1949 it became necessary to construct an addition to the school. Plans were drawn up and submitted to the authorities, who approved them. When the board applied for a building permit, however, the application was refused on the basis of the zoning and building restrictions in force.

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<sup>27</sup>(1951) Que. K.B. 676.



The trustees applied for mandamus to compel the city to issue the building permit.

The question before the Court was: does the by-law apply to schools? The trial judge held that the operation of schools was independent of the prohibitions of the city by-laws. According to the law the board had the right to select sites and therefore was free to build as it saw fit, being subject only to The Education Act. Because the board could build without a permit, the application for mandamus was dismissed.

Neither party was satisfied with the judgment--the city because it felt that the board must observe its by-laws, and the board because it was afraid to begin building just in case the by-law did apply. Thus both appealed.

The Appeal Court held that the school commissioners were indeed exempt from the by-law. Commissioners are given the right to select sites and to expropriate land if necessary. If they have these powers, it is implied that they may build where they have chosen to do so. Although the regulation of sites for public buildings is generally within the competence of municipal authorities, school sites are exempted, the legislature having given the board substantial freedom in choosing sites.

However, in matters other than the choice of site, municipal by-laws do apply to school commissioners. There is nothing, expressed or implied by The Education Act, which would make them immune to municipal by-laws in general. Therefore, to build a school,



the commissioners would need a permit.

In this case a further reason to find for the board was that the school in question had been there long before the by-law was passed. Since the board was planning to accommodate an expanding school population, it was unreasonable to hold that a 1925 municipal by-law made it mandatory to build elsewhere than where the accommodation was needed. The cost of such a building would be out of proportion to the benefits which would be derived from it. Therefore the trustees were entitled to have the building permit.

#### Trespass on School Premises

Trespass is the unauthorized entry onto real property, whether land or buildings. The laws applying to trespass in general apply, of course, to school premises. The question may be asked, however, whether the trustees or teacher should bring such an action. The early Ontario case of Monaghan v. Ferguson<sup>28</sup> clarifies the issue. The school board had rented the Methodist Meeting House to be used as a school. Since the statute<sup>29</sup> gave the board custody of the school house, it was held that under the arrangement made, the meeting house was, for the time being, the common school house. The meeting house trustees, who subsequently broke into the building and removed the stove and its pipes, were held to be trespassers. However, the action was dismissed since the school teacher had preferred the charges. The board as landlord and having

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<sup>28</sup>(1847) 3 U.C.R.B. 484.

<sup>29</sup> 7 Vict. C. 29, s. 44.





the duty of custody and safekeeping of the property, should have brought the action.

Although the case is an old one, in circumstances quite different from those of today, the principle is completely applicable. The board is the owner and custodian of the property, and as such must bring any legal action in case of trespass upon the school premises.

### Teacherages

School laws empower boards to provide living accommodation for teachers. The type, size, location and quality of such accommodation is left to the discretion of the board. In Eltham School District Trustees v. Langston<sup>30</sup> it was held that the board could repair the house donated by one of the trustees, furnish it and place it at the disposal of the teacher if trustees felt this to be in the interests of the school district. They were empowered to do so by Sec. 110(8) of The School Act.<sup>31</sup>

### Buildings Located on Undeeded Land

The case of Cupar Unit School Board v. Jaremecki<sup>32</sup> dealt with the disposal of school buildings located on land to which the board did not have title. Herzog School District was formed in 1906 at which time a school house and stable were built. In 1944 one Jaremecki purchased the land on which the buildings stood. He knew that the

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<sup>30</sup>(1925) 3 W.W.R. 641 (Sask).

<sup>31</sup>R.S.S. 1920, c. 110.

<sup>32</sup>3 W.W.R. 619, (1951) 4 D.L.R. 679 (Sask.).



buildings were owned by the Herzl District and assumed that the land too belonged to the district. From 1913 to 1949 Jaremecki was a member of the board of the district. In 1945 Herzl District became a part of the Cupar School Unit, and in 1948 the unit board decided to dispose of the buildings by sale and erect a new school on another site. Present buildings were no longer adequate.

Upon investigation it was found that the board did not have title to the land on which the buildings were situated. One of the members was delegated to negotiate with Jaremecki for transfer of the two acres enclosed by the school fence. The latter agreed to allow the board to remove the two buildings but insisted that he would retain the land. He later rescinded this agreement, claiming that the buildings belonged to him because, being on foundations, they were a fixed part of the realty. Thereupon Jaremecki moved the barn to his own farmyard, the board sold the school house and Jaremecki sold the teacherage, which was also on the grounds. The board brought suit to recover the cost of the teacherage. Jaremecki maintained that the buildings had been a fixture on land of which he was the registered owner, and counter claimed against the board for the price of the school house.

The Court expressed surprise that the lack of title could have gone undiscovered for forty years, when the Act specifically charged trustees with the care of school property and required an annual audit. However, as soon as Jaremecki acquired title to lands on which the school buildings were situated, he became, in law, a trustee on



behalf of the residents of the school district. Thus when he entered upon the property and removed the teacherage, he rendered himself liable to the damages suffered by the school district.

Hence, the public interest is protected even when the administration of property by school trustees is slipshod.

#### V. Summary

Difficulties arising out of selection or change of school site can usually be traced to failure to observe the statutory procedures. When these provisions have not been followed, the Courts may intervene, directing that the proper steps be taken as required. When the procedures have been lawfully followed, even though the action of a board may be unwise or opposed to popular feeling within the district, the Courts do not interfere. They look upon their function as one of insuring that the statutes are being followed rather than as one of arbitrating local disputes or of ruling upon the merits of actions taken. It may be noted in passing that procedures regarding the selection and change of site not in accordance with the statutes, but accepted by trustees and ratepayers alike, do not come before the Courts, and therefore are also valid, at least until questioned. Even when questioned, after a long period of acquiescence, the action may be considered to have been valid at the outset.

Legislation providing for expropriation of lands for school purposes is strictly construed. The Courts hold that in return for being deprived of his right to dispose of his property as he wishes,





the owner must be fairly compensated. The value placed on the property must be what it is actually worth, taking into consideration all present possibilities other than the increase in value which would result from the property's being in demand for school purposes.

Adjoining lands have been defined as those which are easily accessible from each other; they need not be in physical contact. Expropriation rights are held to extend only to lands held privately and not to those held by other public corporations which also have powers of expropriation.

Numerous miscellaneous factors are involved in the provision of school accommodation. Thus the Courts have held that public school boards may rent church facilities for temporary accommodation. According to judgments rendered boards may also construct new buildings or additions to existing buildings even though such construction violates municipal zoning by-laws. In cases of trespass on school property, if action is to be brought, it is the board in its capacity as owner and custodian, which must do so. Finally, if school buildings are situated on land to which the board does not hold title, the public interest is, nevertheless, safeguarded. The Courts hold that a person who purchases such land and acquires the title, becomes a public trustee, holding the buildings in trust for the residents of the school district. This is true even though the buildings may be permanently fixed.



## CHAPTER IX

### SCHOOL BOARD CONTRACTS

As was established in Chapter III, the school board is a corporation created and controlled by statute and with those powers and duties expressly or impliedly conferred and imposed upon it. As a corporation the board has the power to contract and, in fact, exercises many of its powers and discharges many of its duties by contracting with other persons. In this way it provides school buildings and facilities, equipment and supplies, instructional and administrative staff, pupil conveyance, repair and maintenance of facilities and so on. Although the number and variety of contracts the board may enter into are extensive, the statute controls the subject matter of school board contracts. Because it has a purely governmental function, the board can enter only into those contracts which will promote the purposes of education. It may not engage in proprietary activities not directly related to the discharge of its responsibilities. For example, although a school board may provide transportation to and from school for children, it may not use its facilities to operate a public transit system. Nor may it engage in commercial activities for the purpose of making profits which could be applied to financing its primary functions.

Because the school board is a corporation, it can act only in its corporate capacity when it contracts with other persons. This being so, the board must observe all the necessary formalities to



enter into a lawful contract, as was indicated in Chapter III. Thus, it can contract only at a meeting of the corporate body assembled according to the provisions of the statute. Members acting individually cannot bind the corporation, even if they all agree to the proposed action, unless the statute so provides. Further, it has been held that the evidence that the corporate body has obligated itself is the presence of its seal, affixed in the manner proscribed.

This chapter is sharply delimited because even within the limits imposed by the statutes, the range of types of contracts which the board may make is very great. Complete discussion of the board's contractual powers, activities and liabilities would have to consider almost all school board activities. Such a study would be beyond the limits of the present investigation. It would have to deal more broadly with and penetrate more deeply into each of the board's activities than can be done here. Since this investigation is limited to the study of the decisions of the Courts, only those aspects of school board contracts that have been discussed in legal cases are considered.

This chapter does not, therefore, treat the general law of contracts, to which the board as a legal person is subject. Nor is the whole question of the board's contracts with its employees, especially with teachers, considered, for the relations between the board and its employees is a broad enough topic to be treated in a separate study. Other matters arising out of the board's contractual activities such as purchasing supplies and equipment are also omitted.





Still other aspects such as pupil conveyance and personal liability of trustees are dealt with in Chapters VI and X respectively of this study.

The following topics are investigated and reported in this chapter:

- (1) Necessary formalities prior to contracting an obligation;
- (2) Powers of a board to enter into a contract before the necessary finances are available;
- (3) Unauthorized contracts such as leasing school property, contracts of trustees with the board, and hiring without proper authority;
- (4) Liability of the board in contract;
- (5) Contractors' bonds and mechanics' liens.

#### I. Formalities Necessary to Make a Binding Contract

The following quotations from school legislation illustrate the necessity for conducting all the business of a school board at a properly constituted meeting of the corporate body.

The rights, powers, duties and liabilities of a Board of School Trustees rests only with the legally constituted Board and not with committees of trustees or individual trustees.<sup>1</sup>

An act or proceeding of a board of trustees that is not done or taken at a regular or special meeting of the

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<sup>1</sup>The Public Schools Act, (B.C.) 1958, C. 42, s. 89(2).



board, shall not be valid or binding on any person affected thereby; and if such an act or proceeding is done or taken at a regular or special meeting of the board, it shall not be valid or binding as aforesaid unless all the trustees were present at the meeting or notice thereof was given as required by this Act and at least a majority of the trustees were present at the meeting.<sup>2</sup>

All administrative acts of school commissioners or trustees shall be done in virtue of resolutions adopted at regular or special sessions of their school board.

...Before proceeding at a special meeting, it must be ascertained and entered in the minutes of the meeting that the notice calling the same was served as required by law on the members of the board who are not present at the opening of the meeting.<sup>3</sup>

What then, are the consequences of action taken by a board without observing the statutory requirements? Some indication of the answer to this question was given in Chapter III. In this chapter cases are more fully discussed.

In Marshall v. Kitley School Trustees,<sup>4</sup> an early Ontario case, a contractor had erected a school house on land owned by the school board, pursuant to a contract with the trustees. The contract, though signed by the trustees, was not sealed with the seal of the board. The building was accepted and used as a school house by the board, but trustees refused to pay the contractor who sued to recover. The Court ruled in favor of the board, because the contract was not under seal, holding that only the seal, and not the signature of the

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<sup>2</sup>The Public Schools Act, R.S.M. 1952, C. 50 s. 122.

<sup>3</sup>The Education Act, R.S.A. 1941, C. 59, Ss. 120, 212.

<sup>4</sup>(1855) 4 U.C.C.P. 373.



individual trustees, authenticates the concurrence of the whole body corporate in the act proposed.

The ruling of the Court seems to be somewhat harsh and unjust to the contractor. However, it must be remembered that a school board is a public body, administering public business and expending public funds. It has been given certain powers which it cannot exceed. Were it permitted to do so, even to protect the interests of an individual contracting with it in good faith, there would be opportunity to mismanage on other occasions. The Courts, therefore, interpret such legislation strictly, for it has been passed to protect the public interest. The person contracting with the board must assure himself that all necessary proceedings have been taken, before he contracts with the board. If he does not, he may be without remedy, for it is an old rule that ignorance of the law is no excuse.

The same principle carried the decision in two Saskatchewan cases. In Waterman-Waterbury Manufacturing Company v. South Arcola School District<sup>5</sup> plaintiff company sought to recover \$399.96 for work done in remodelling defendant's school.

At a board meeting in March, 1926, a representative of the plaintiff informed the trustees that their school could be remodelled for \$2,350, the price to include installation of a new furnace and chemical toilets. At the meeting the trustees placed a provisional order for the furnace and the toilets, subject to the school's being

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<sup>5</sup>(1928) 3 W.W.R. 690, 23 Sask. L.R. 227, (1927) 2 D.L.R. 211.





remodelled. Later the board applied to the Local Government Board for permission to borrow \$2,350. Having obtained the necessary permission, the board passed a by-law in May for borrowing this amount, to be used for repairs and an addition to the school. The trustees called for tenders but receiving none, they wrote to the Waterman-Waterbury Company asking it to tender, stating the approximate costs. The Company's reply was that it would undertake the work at cost plus ten per cent, estimating the cost at \$1,500, but not including transportation of materials nor the cost of new equipment proposed.

In its reply the company enclosed a contract form. The chairman, rather than calling a meeting of the trustees, telephoned each, obtained his agreement to the terms and, together with the secretary, signed the contract to be returned to the company. Thus the contract was not agreed to at a regular or special meeting of the board, nor was it sealed.

The work was completed in September, 1926, and the board acknowledged its satisfaction under seal, accepting the building. The acknowledgment, however, was not considered at a meeting of the board either. The board had made payments during the course of the work and at its completion, totaling some \$3,109, which was thought to be the total owing. However, the plaintiffs discovered a bookkeeping error of \$399.96 in the labour account and requested payment. The board refused on the ground that it held a receipt from plaintiffs marked "Paid in full", and the company brought action to recover.

The trial judge dismissed the action on the ground that there had been no compliance with Sec. 105(1) of The School Act<sup>6</sup> which stated:

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<sup>6</sup>R.S.S. 1920, c. 110.



No act or proceeding of any board shall be deemed valid or binding which is not adopted at a regular or special meeting at which a quorum of the board is present. A majority of the board shall form a quorum.

On appeal, Martin, J.A. for the Court of Appeal, held that this section is imperative. The board must act in a body at a meeting with a quorum present. Contracts of a municipal corporation are absolutely void unless provisions regarding the formalities are complied with. The same rule must apply to school boards. "Persons entering into contracts with school boards should be careful to see that the statutory provisions are strictly observed."<sup>7</sup>

Another case involving the same company, emphasizes the principle followed above.<sup>8</sup> In July of 1926 fire destroyed the Slavanka School, and since the new term was to begin on August 15, trustees were anxious to have a new school built without delay. Thus on the day after the fire they interviewed a number of contractors, including a representative of plaintiff, to get estimates. They also held an informal meeting of ratepayers, at which some objected to rebuilding on the old site without investigating a new site, and without examining the question of financing. However, the trustees, after considering all the estimates submitted, let the contract to the plaintiff at a cost of \$4,100. The contract was signed and sealed, though because of the local emergency, not adopted at a regular or

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<sup>7</sup>(1927) 2 D.L.R. 214, at p. 217.

<sup>8</sup>Waterman-Waterbury Manufacturing Company v. Slavanka School District (1929) 1 W.W.R. 598, 23 Sask. L.R. 338.



properly convened special meeting.

On the next day the board received a petition requesting a meeting of ratepayers to discuss the matter of a new school site. The meeting was held, a new site was decided upon and a committee formed to approach the municipal council to establish the site according to the provisions of the statute.<sup>9</sup> The school secretary notified the company to hold up shipment of materials until the local difficulties were settled.

On August 2 the municipal council approved the new site, but the board protested and applied to the Department of Education for arbitration. When the department took no immediate action, the trustees instructed plaintiff on August 27 to send its construction crew immediately. When the foreman arrived, the board chairman, without authorization from a regular board meeting, instructed him to proceed on the old site. The ratepayers then protested to the Department of Education and the Deputy-Minister wired the board to the effect that the new school was to be built on the site approved by council. The board ignored the telegraphed instructions and the Deputy-Minister stopped all building operations. A meeting of trustees, attended by the construction foreman and a departmental representative followed, at which the latter instructed the foreman to continue construction until the building reached a stage where it

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<sup>9</sup>The School Act, R.S.S. 1926, C. 30, s. 4.





could be left. He did so, halting all work on September 18.

The school trustees were subsequently ousted from office by action in district court. When a new board had been elected, the company sued for recovery of \$1,704 which was the cost of work done and not paid for at the time of cessation of construction. The new board contended that the contract was invalid because it had not been adopted at a regular meeting. The special meeting was not a legal one because there had been no notice and members at that time had not waived notice. The new members filed a counter claim to recover \$500 which had been paid on account. The trial judge held that the meeting should be considered a legal one for all trustees had been present and had tacitly waived notice. Judgment was handed down for the plaintiffs and the board appealed.

The appeal was heard before the Court of Appeal and Martin, J.A. determined the judgment, as in the previous case. He reaffirmed his statements in that judgment, saying:

A school board being a creature of statute can only enter into binding and valid contracts by complying with the statutory provisions; the business of a school board must be transacted at a regular or special meeting, which must be convened under the provisions of Sec. 104(3) with respect to waiver, and this was not done in the present case.<sup>10</sup>

He indicated that the imperative provisions of the statute may work hardship on a corporation or individual contracting with the school board in good faith on the assumption that there had been full

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<sup>10</sup>(1929) 2 D.L.R. 161, at p. 167.



compliance with them. However, in this case, the plaintiffs knew of the trouble in the district and were warned that a new site had been selected. They were fully cognizant of what was going on and could not plead innocence. Judgment of the lower court was reversed, and the board allowed to recover money which had already been paid to the company.

Similarly, where a workman had been employed by the secretary of a district to work on a school building, and the workman was injured in the course of the employment, the school corporation was held not liable for compensation because the workman had not been employed at a regularly constituted board meeting. The provisions of Sec. 105 of The School Act were imperative.<sup>11</sup>

In the cases discussed above contracts could not be enforced against the school board because they had not been adopted at properly convened meetings of the corporate body. The judgments imply that the board would be unable to enforce contracts against other individuals, if those contracts were reached under similar circumstances. Also the consequences of fraudulent actions could not be escaped by the board by pleading irregularity of the meetings. That is to say, trustees could not deliberately contract in an irregular manner hoping thereby to escape liability in the event of difficulty. In such cases liability would accrue against the individual members,

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<sup>11</sup>Stuart v. Pennant School District (1927) 1 W.W.R. 949,  
2 D.L.R. 940 (Sask.)



and not against the corporation, for the corporation as a legal person cannot commit a fraudulent act, at least where the act is ultra vires the corporation.

## II. Contracting before Finances are Available

### Building Contracts

Urgent need for new school buildings or additions to existing buildings may cause a school board to enter into various phases of construction programs before the necessary finances are arranged. The board may do so, confident that the arrangements can be made. It may engage an architect to draw not only sketch plans and to estimate costs, but to make detailed drawings and specifications. It may even go so far as to engage a builder and enter into agreement with him. Having done so, what is the board's position and that of the person who has contracted with it, if the required finances cannot be arranged? Though provincial requirements differ in detail, the board must usually get permission from some other body, either the central authority or the municipal government, before it is authorized to proceed. Therefore details may differ from province to province, but the legal principles illustrated in the following cases could apply in all provincial circumstances.

Smith v. Ft. William School Board. The leading case in the matter of letting contracts before the necessary funds are provided is Smith v. Ft. William School Board.<sup>12</sup> This was an action brought by

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<sup>12</sup>(1893) 24 O.R. 366.





a ratepayer on behalf of himself and other ratepayers to restrain the board from continuing to construct a school building, and to compel the contractor to repay to the school corporation the money already advanced to him.

Facts of the Case. On September 12, 1892, the school board applied to the municipal council for \$12,000 to build a new school. The question was submitted to the ratepayers and passed in February, 1893. Tenders for the construction were called and one for \$18,860 was accepted though it did not include heating or ventilation, nor clearing and fencing the grounds. The contract called for completion by November 1, 1893, and for payment of eighty-five per cent as progress dictated with the balance thirty days after completion. The contractors were local ratepayers who were fully aware that only \$12,000 had been authorized for the project. Their legal advisers informed them, however, that the board would be able to get more money. Hence they proceeded with the work, and plaintiff began this action.

The Court issued an injunction against proceeding with the work and from doing anything costing more than \$12,000. When work was stopped, excavation had been completed and piling for the foundation had been installed. The board had paid \$2,625 for this work. The total estimated cost of the project was \$21,216.

Issue Before the Court. There was really only one question upon which it was necessary for the Court to rule; namely, does a school board have power to bind the school corporation to erect a building for which it has not the means to pay?



The Judgment. The Court reviewed the board's statutory powers and duties briefly. By various sections of the Act boards were required to provide adequate school accommodation. They might do so by purchase, by rental or by construction. In any event, they were required to submit their estimates to the municipal council which in turn was required to levy the rates. In respect of borrowing, Ontario school boards must request council for the necessary by-law. Council could approve or submit to the ratepayers.

Thus, the Court said, the right of a board to build a school is not absolute, but contingent upon getting the consent of another body--in this case either the municipal council or the ratepayers. However urgent the board might consider the need for building, it could do nothing unless that consent had been obtained. Thus the effect of the statutory procedure was to prevent the board from entering into a building contract before the money was available. The legislature had clearly intended that it should not contract a debt without the means of paying it.

Were boards permitted to do so, and they did in fact build the school house, the municipal council and the ratepayers would be compelled to pay for it when otherwise they might have refused to authorize the expenditure in advance. This would defeat the purpose of the legislature. Therefore, it was held necessary to enforce the legislative safeguards against school board zeal and extravagance.

The Court said:

The only principle to be laid down in my opinion, is that the school board of a city, town or incorporated village, have no power or authority to enter into any



contract for the building of a school house until the necessary funds have been provided under Sec. 116; and that if a certain sum has been provided under that section for the purpose of building a school house, they cannot be allowed to enter into any contract or undertake any work involving the expenditure of any greater sum.<sup>13</sup>

The contract was therefore held to be beyond the powers of the board and not binding upon it. The contractors should have enquired into the powers of the board, to protect themselves. In fact, they were fully aware of the situation as were members of the school board. The latter had no right to pay out the money and the former had no right to receive it. Thus, if the work already done was of any value to the board in building a smaller school, allowance should be made to that extent. Otherwise, the contractors were required to repay all the money they had received.

Lawrence v. Beaver Valley School Trustees. This Saskatchewan case<sup>14</sup> involved somewhat different material facts and therefore carried a different judgment. By Sec. 110(8) of The School Act the board could borrow up to \$1,200 for erection of the first school house without a vote of ratepayers, but if that amount was exceeded, a poll might be demanded. If the vote carried, the board was required to apply to the Local Government Board for authority to borrow the amount approved by the ratepayers.

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<sup>13</sup>Ibid., at p. 372.

<sup>14</sup>Lawrence v. Beaver Valley School Trustees (1918) 3 W.W.R. 71, 11 Sask. L.R. 429, reversed (1918) 3 W.W.R. 607, 11 Sask. L.R. 434, 43 D.L.R. 318.





In December, 1916, a by-law for \$2,100 had been rejected by the ratepayers. Nevertheless, the board applied to the Local Government Board, and was advised to pass a by-law for \$1,200. In August, 1917, the trustees entered into a contract to have a school built and furnished for \$2,398. No by-law had been passed authorizing the contract nor providing the money before entering into the contract, but before the school was erected, ratepayers did approve borrowing \$1,000 in addition to the \$1,200 the board had already borrowed under the provisions of the Act. This action of the ratepayers thus ratified the board's action. When the building was almost completed, a ratepayer applied for an injunction to prevent the board from continuing.

The Trial Court followed Smith v. Ft. William School Board, ruling that the board could not build in excess of the funds available before the beginning of the project. It had passed a by-law for only \$1,200 and could not exceed that amount. Since the building was complete, injunction could not restrain construction, but an order was issued to prevent payment of more than \$1,200, or to prevent borrowing more. This judgment was appealed.

The Appeal Court held that since the ratepayers had already approved the expenditure of a further \$1,000, and since the school was already built, on a site approved by the proper authorities, the trial judgment was in error. Injunction could be granted only before the school was erected or if proper authority for the expenditure had not been obtained. Here the board's action had been ratified by the ratepayers, and therefore, the Court had no power to restrain the trustees from spending the money for the school house.



Comparison of the Two Cases. In Smith v. Ft. William School Board the injunction was granted before the construction had proceeded very far, and on the grounds that the board had not been authorized to make the proposed expenditures. In Lawrence v. Beaver Valley School Trustees construction was completed before action was taken and therefore the board could not be restrained from building. In addition, the necessary financial arrangements had been approved, before the action, though not before the contract was made.

A further possible variation from Smith v. Ft. William School Board occurred in Forbes v. Grimsby Public School Board.<sup>15</sup> In this case it was held that the building contract was not necessarily limited to the amount for which debentures would need to be issued. The board could realize some money from the sale of the old school and site, and this, together with what was being borrowed, then formed the upper limit of the amount for which the board could contract.

#### Contracts with Architects

Even before a school board can arrange the financing of school construction it must engage an architect to do certain preliminary work. The position of the board and the architect in the event that the proposal is rejected is illustrated by two Ontario cases.

In the first, Erb v. Dresden Public School Board,<sup>16</sup> the board had advertized for a sketch plan of a ten-room school. Plaintiff

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<sup>15</sup>(1903) 7 O.L.R. 137.

<sup>16</sup> 18 O.L.R. 295.



submitted such a plan and when the board later advertized a competition for complete plans and firm cost figures, he again submitted a plan which was selected by the board. The plan estimated the cost of the school at \$28,000. Following this action, the board presented a series of proposals to borrow money, but each was defeated. Finally in May, 1908, plaintiff presented an account for \$700 or 2.5 per cent of the estimated costs according to his plans. The trustees agreed to pay, but upon further consideration of the matter, unanimously reversed their decision at a subsequent special meeting. The architect sued to recover.

The Court held that the principle laid down in Smith v. Ft. William School Board applied here. School boards are not ordinary employers capable of controlling the process of building. It is the duty of the board to provide adequate accommodation, and therefore it is its duty to undertake the necessary preliminary work in preparing sketch plans and estimates for their own information and that of both the council and the ratepayers. They could not, however, proceed beyond this. Therefore, this was merely a tentative preliminary to ascertain whether the building as planned would be built or not and that depended upon funds being supplied by the municipality in response to a vote of the electorate.

The contract was held to be divisible. It was one which developed in three stages: (1) preparation of the plans; (2) preparation of the specifications; (3) taking charge of and supervising the actual construction. The board had used and taken benefit of what was done, and therefore should pay a proper sum for that part of the





work which it had used and from which it had benefited. The Court held that a fair allowance would be \$125.

The second case, Hutton v. Barton School Trustees,<sup>17</sup> was very similar in regard to material facts. The board had employed the architect who had drawn up complete plans and specifications. However, the issue of debentures for the building was not authorized by the ratepayers. Kelly, J., held that the architect was entitled to one-half his full fee of five per cent of the contract price. He said:

Plaintiff is entitled to the value of his services on quantum meruit, but limited to the work and services he performed which were necessary for the purposes in respect of which the defendants at the time had power to obligate themselves. Not all that the plaintiff did in preparing the plans and specifications would have been necessary for the instruction and information of the defendants, the council and the ratepayers. He knew, or should have known the statutory limitations of the defendants' power to incur binding obligations.<sup>18</sup>

Thus, it was necessary for the board to have the services of the architect to draw up the proper estimates on the basis of which to ask for a debenture by-law. By implication it had authority to employ the architect to that extent, but not to draw up finished plans and detailed specifications. Such power could come only after the debentures had been approved. Also, to the extent that it had power to employ, the board was obligated to pay, and the Court merely placed its estimate on how much this would be.

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<sup>17</sup>(1926) 31 O.W.R. 358.

<sup>18</sup>Ibid., at p. 359.



Regardless of the urgency of the need for increased school accommodation, as perceived by the trustees, school boards may not act on their perceptions except by following the procedures laid down by the statutes, even though those procedures may be time-consuming and though there may be danger that the board's plan will be rejected. If it is required to obtain permission to borrow, either by vote of the ratepayers or from some other authority, the board must do so in the manner specified. It may not commit the school district financially beyond the limits approved. To do so would amount to circumvention or modification of an Act of the legislature, and the board has no power to modify its own constitution.

Thus, the Courts have ruled that a school board may not contract for amounts greater than the funds which are available, or which have been properly approved. Such funds may come from sources other than borrowing or from current revenues as provided by statute. For example, a board may supplement the amount it has borrowed by proceeds of the sale of an old site and building. In such a case, its contractual limit would be beyond the amount it has been authorized to borrow. It might also be implied that small sums expended in excess of funds made available on the basis of estimates would not be questioned by the Courts.

If, as the Courts have established in the cases cited above, a board may contract only to the extent of the funds which are provided, it follows that careful estimates must be made. These can be made only on the advice of experts. The Courts have held that boards are entitled to employ such specialists for the purpose of preparing



estimates, but as in the case of architects, they may not contract to have final plans and specifications drawn before they have made complete financial arrangements. If the statute specifically permits boards to do so, of course, this generalization does not apply.

### III. Other Unauthorized Contracts

#### Leasing Property

Certain types of contracts such as those in which trustees lease school property for revenue purposes or where control passes out of the hands of the board, are ultra vires unless specifically authorized by statute. Where such a lease is made and subsequently cancelled, it has been held that the board must in equity, repay the consideration paid for the lease. This principle was advanced in Niagara Public School Board v. Queenston Women's Institute.<sup>19</sup>

Between the years 1903 and 1914 the Queenston Women's Institute had attempted to raise money to build a community hall dedicated to the memory of Laura Secord, and had collected \$3,000. Also at that time, the board, needing a new school, had plans drawn up. The Women's Institute proposed to the board that if the school plans were modified to include a hall to be used by the community, it would donate \$3,000 toward the cost of construction. In return the Institute asked that the school be named after Laura Secord, and that certain rooms be leased to the Institute. The board agreed and a lease for 999 years

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<sup>19</sup> 59 O.L.R. 213, (1926) 4 D.L.R. 13.





was drawn up, providing that the Women's Institute would pay a rental of one dollar per year, and further that if they were at any time denied the use of the premises, the board would be required to repay the \$3,000.

The arrangement was honored for ten years, the hall being used for various community purposes as required or permitted by the board. In 1924, however, the board, consisting of new trustees, desired to use the space occupied by the Women's Institute. The latter refused to give it up and produced a copy of the lease to prove their right of occupancy. The board repudiated the lease and the Institute moved out of the building demanding repayment of their money at five per cent interest. Thereupon the board initiated legal action asking for a declaration that the lease was void.

The board's argument was that the lease was ultra vires the board and therefore void. It maintained that it did not wish to deprive the Institute of the use of the building but only to place it under the same controls as applied to other community groups. The Institute stood firmly on the conditions of the lease, to which the board countered that the agreement had provided only for the erection of a memorial which had been done.

The Court suggested that the whole case was based on the question of the validity of the agreement. The board, a statutory corporation, could perform valid acts only within the powers authorized by the statute. The lease was not valid because the power to make it had not been granted to the board. Rather than to lease property which it may not need, the board is authorized by statute only to dispose of it "by sale or otherwise." The statute permits the board to allow use of the premises but



not to lease them. To allow such leases, by which control passes from the board, however temporarily, was contrary to the Act.

Said Grant, J.:

School buildings were intended to be erected and after erection to be used for the education of children of the citizens or ratepayers of the school section, and it was never contemplated, nor, as I understand it, is there any language used in the statute from which it can fairly be contended that a school board would have a right to do what was here attempted to be done. To hold otherwise would let in a flood of transactions on the part of boards of school trustees which would be entirely foreign to the intention of the legislature and would enable the trustees to do things which by our own Courts it has been held they are not authorized to do.

...The attempted granting of a lease for 999 years of a portion of the school premises, was and is ultra vires the board of trustees, even though it had been approved at a meeting of the board properly called and held, and even though the indenture of lease had been executed under the corporate seal.<sup>20</sup>

A similar type of prohibition regarding a school board contract, though in different circumstances, was applied in Re Almonte Board of Education and Almonte.<sup>21</sup> The school board in the town of Almonte, Ontario, was a union board under Sections 13-16 of The Boards of Education Act.<sup>22</sup> As such it had acquired all the property of the former high school and public school boards, and was obligated to perform all the duties imposed on the former boards. On its formation it became a separate corporate entity, but because the high school

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<sup>20</sup>(1926) 4 D.L.R. 13, at p. 19.

<sup>21</sup> 64 O.L.R. 505, (1930) 1 D.L.R. 568.

<sup>22</sup> R.S.O. 1927, c. 327.



supporters were not identical with the public school supporters, high school and public school finances had to be kept separate.

The board owned two buildings which had belonged to the public school board, within the town, and conceived the plan of enlarging one so that it would accommodate all elementary school pupils and using the other exclusively for high school purposes. The high school would pay \$2,400 per year rental which would be applied to the cost of elementary school operation. The Court held that the board had no statutory power to do this "even though it might be shewn that as a business transaction an individual landlord would regard it as prudent if he stood in the place of the public school board."<sup>23</sup> The public school board was authorized to dispose of excess property by sale or otherwise and to apply the proceeds for school purposes. Leasing does not come within the Act, for to dispose of it means to transfer title.

Middleton, J.A., held further that:

It (the board) cannot be both landlord and tenant and agree with itself as to the rent to be paid. It cannot be both vendor and purchaser and fix the price to be paid. The whole scheme propounded may be the most reasonable possible in the interests of both sets of ratepayers, but I cannot see that any power is given to this board to represent both bodies in a transaction in which bargain and negotiation are essential elements.<sup>24</sup>

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<sup>23</sup> 64 O.L.R. 505, at p. 510.

<sup>24</sup> Ibid., at p. 510.





To permit transactions of this kind, there would have to be further legislation. The board did not have the power to carry on proprietary activities. Therefore, the Court suggested, the proper course would be to enlarge one of the buildings sufficiently to accommodate all school pupils. Then the other could be sold and the proceeds applied in payment of any debt incurred by the enlargement of the first.

School boards may not lease property for revenue or other purposes. This is not to say that they may not rent premises such as school auditoriums and gymnasiums for the use of local community groups and charge rental fees. The distinction, as shown in Niagara Public School Board v. Queenston Women's Institute, is that they may make no agreements whereby control passes out of the hands of the board, even temporarily. School buildings are erected for public purposes--primarily the education of children--and with public funds. Boards are the custodians of the buildings, holding them as a public trust, and therefore may not assign control to anyone else.

#### Contracts between Trustees and the Board

School Acts prohibit school trustees from contracting with the boards of which they are members, and those who do so are personally liable for the penalties imposed by the statutes.<sup>25</sup> There may, however, be extenuating circumstances, or instances in which the Courts do not

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<sup>25</sup>See Muirhead v. Bullshead Butte School District, pp.323-24 infra.



interpret literally the wording of the Act. Thus in McLabb and Jamarin v. Findlay<sup>26</sup> the board awarded a contract for repairs to a school house to a contractor, but stipulated that excavation work required was to be done by local labor. The contractor hired defendant and his brother, chairman and secretary-treasurer respectively of the school board, and they were paid by a school board cheque. Plaintiffs who were newly elected trustees sued to recover the amount for the district, contending that the payment was in violation of the section prohibiting contracts with the board.

The Court held, however, that the pertinent sections of the Act contemplated loss to the district. When, as in this case, no loss resulted, and violation of the section was innocent, the trustees concerned were not liable for the penalties provided. The district had received the benefit of the repairs; the doing of the repairs was within the competence of the board; and the board had suffered no financial loss. The action was dismissed.

Similarly in a Manitoba case,<sup>27</sup> trustees were not held liable for doing work for the board and receiving remuneration for doing so. The board had awarded a contract for \$600 to build a school house. Before the work was completed, the contractor defaulted and the defendant, together with the secretary-treasurer, both trustees, and without the

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<sup>26</sup>(1932) 3 W.W.R. 255 (Sask.).

<sup>27</sup>Vassar School District Corporation v. Spicer (1911) 18 W.L.R. 147, 21 Man. R. 777.



formal authorization of the board, undertook to complete the work. They used school funds to reimburse themselves for the cost of materials and their labor, to a total of \$875.91. At the end of defendant's term of office, the new trustees initiated action to recover this money, although they had accepted and used the building, contending that the money had been improperly spent.

Robson, J., held that they could not recover since they had adopted and ratified the work done by the defendant. Quoting paragraph 2838 of Thompson on Corporations, the Court indicated that officers advancing money for the necessary work of the corporation, even though the transaction is ultra vires in the sense that it is not authorized, may be subrogated to the rights of creditors whose claims are paid by the money so advanced. Here the money advanced by the two trustees had been used to complete the building, and such moneys were either originally or by ratification, the legitimate debts of the corporation.

In a Quebec case, Paquette v. Notre-Dame-Auxiliatrice School Commissioners<sup>28</sup> the Court held that sale of land for a school site to the school commission by one of the members was not to be considered as having une entreprise with the corporation. It was not necessary for the commission to get prior approval of the Lt.-Governor in Council or from the Superintendent if the commission had funds available for the purchase.

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<sup>28</sup>(1934) 43 R.L.N.S. 211.





statute, it cannot be enforced against the board. By implication, the board could not enforce such a contract against another person either. When a contract has been made in compliance with statutory procedures, it is the board, and not the trustees individually, which is liable.

This was held in Livingstone v. Boularderie School Trustees,<sup>30</sup> an early Nova Scotia case in which the board had agreed to pay a fixed price for erecting a school house. When, after the completion of the building, the board refused to pay, plaintiff sought to recover from the members individually. The Court held, however, that the trustees had contracted legally on behalf of the corporation and not as individuals. Therefore it was the corporation, and not the members, which was liable.

The same principle has been applied in numerous cases involving litigation between the board and its employees. The ruling given by Robinson, C.J., in Anderson v. Vansittart<sup>31</sup> illustrates the general opinion of the Courts. This was an action by a school teacher against the trustees individually for not furnishing him with fuel as required by the Act.

It was held that the board was a corporation, which had acted in its corporate capacity when it engaged the teacher and agreed to supply fuel. Thus it was only in that capacity that the board was

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<sup>30</sup>(1880) 13 N.S.R. 535.

<sup>31</sup>(1849) 5 U.C.Q.B. 335.



Contracts of the school board with corporations of which trustees are members, have been discussed in an earlier chapter.<sup>29</sup> Those cases dealt with disqualification of trustees, but would also come within the discussion at this point.

It may be argued that in interpreting sections of School Acts related to contracts between the board and its members, and in reaching their decisions, the Courts employ equitable principles. The spirit of the statutes and the intent of the legislature has apparently been to prevent loss to the district through trustees taking improper advantage of public office. Unless such improper advantage is evident, the Courts tend to take a lenient view of mere technical violations of the law. Nevertheless, school trustees, as all public officials, must exhibit a high standard of ethical behavior, and their contracts with the board, however innocent or whether intended for public benefit, may be criticized. Any such transaction which tends to degrade or cheapen school business should be strictly avoided, not only to protect the trustees from public censure, but also to enhance the cause of education.

#### IV. Liability of the Board in Contract

Cases already discussed in this chapter indicate that when a contract has not been made in accordance with the requirements of the

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<sup>29</sup> See Re School Ordinance, and Lee v. Toronto Public School Board, pp. 82 and 83, respectively.



liable, and not as private individuals. The corporation contracted on behalf of the public in observance of a general law passed by the legislature. The trustees had no personal interest in the contract and could not be held personally liable.

The school corporation, entering into a contract by the proper statutory procedure, is liable even if the contract is inarticulately drawn. The rule was laid down in Cochlan v. Tilbury East School Trustees.<sup>32</sup> Here the board had entered into a contract for construction of a school building. The contract referred to no special plan and was not dated. It did specify that "the whole (was) to be of good materials, and to be finished in good workmanlike manner, and to be finished on 1st. July, 1873."

When the school was completed, the board had made some \$400 in progress payments but refused to pay the remainder of the \$708 called for by the contract because of dissatisfaction with the workmanship. The Court held that the board was liable. The contract had operated for the purposes intended. If the board was not satisfied, this was a penalty for not having taken proper care in drawing the contract.

Because the board has perpetual succession, it is liable for the contracts negotiated by former trustees on behalf of the corporation. This principle was illustrated in Giroux v. Corporation des Ecoles Catholiques de Verdun.<sup>33</sup> In this case the school commission had

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<sup>32</sup>(1874) 35 U.C.Q.B. 575.

<sup>33</sup>(1955) Que. S.C. 207. See also Porteus and North Vancouver School Trustees, p. 78, supra, Royal Bank v. Acadia, p. 72, supra, and Canada Permanent Loan Co. v. Donore, p. 78, supra.





contracted with plaintiff at a meeting held on June 20, 1952, to supply fuel oil for the next year. Soon afterward there was a school election at which new commissioners were chosen. On August 20, 1952, the new commission repudiated the fuel contract and allotted it to another firm, for exactly the same amount, quality and price.

In the resulting litigation the commission charged that the meeting at which the first contract had been awarded was illegal by reason of the absence of the secretary-treasurer and that no temporary replacement had been appointed. Further, it charged that the previous commissioners had abused their functions, using the contract to play politics in view of the forthcoming election.

The Court dismissed the first charge as being completely without foundation. There was no requirement which made the presence of the secretary-treasurer necessary to holding a valid meeting. Regarding the second charge, there was no evidence of abuse of powers. In fact, the new commissioners had entered into an identically similar contract except with a different supplier. Furthermore, it was common practice and good business to insure early that the fuel would be delivered.

Since the commission had entered into a binding contract, and as a corporation had perpetual succession, the new commissioners were bound by the acts of their predecessors in office. Plaintiff was awarded \$500 in damages for breach of the contract which was then cancelled.



## V. Contractor's Bond and Mechanic's Lien

Contractor's Bond

It is desirable and commonly observed practice to require a building contractor to post a performance bond. The type of bond which is desired must be carefully stipulated in the contract; otherwise the board may find itself embarrassed. In Greenwood v. Estevan School Trustees<sup>34</sup> the board had contracted with plaintiff for building a school at a cost of \$18,325, the contractor to post a bond for \$5,000. He did supply a bond signed by himself and three citizens as sureties. The board requested a bond from a regular bonding company, failing which a certified cheque for one-quarter of the contract price was to be deposited with the board. Plaintiff declined to change the bond, and when the board refused to let him proceed with the work after he had notified it of his readiness and ability to do so, he brought action for breach of contract. The lower Court ruled for the board, but the Appeal Court reversed the decision, holding that the bond was sufficient according to the terms of the contract. Had they wanted one from the bonding company, the trustees should have said so in the agreement. Plaintiff was therefore entitled to damages amounting to his expenses, incurred while preparing to carry out the construction, plus profits he might have earned during the delay caused by the board's action.

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<sup>34</sup>(1910) 15 W.L.R. 568, 3 Sask. L.R. 435.



### Writs of Execution and Mechanic's Liens

Although the matter of filing and enforcing a writ of execution or a mechanic's lien against school property is controlled by statute and discussed in a number of cases, two only are reported here, illustrating opposing points of view. The first opinion held that school property could not be sold in payment of a legitimate debt against the school corporation, while the second maintained that there was no reason to exempt school property from such liability.

Scott v. Burgess and Bathurst School Trustees<sup>35</sup> concerned construction of a school house. When the trustees were unable to pay for the construction, plaintiff obtained a sheriff's order to sell the building at public auction. At the auction he bought the building himself. The trustees brought action to recover it for school purposes.

The Court considered the question to be an important one, namely: are school houses and lands liable to be sold upon execution at the suit of anyone who has obtained judgment against the corporation for a debt due? If so, then the same principle should hold against the corporations of counties, and cities, and all public buildings would be liable to sale upon writs of execution.

By statute the corporate board was required to acquire and hold the land and school house for common school purposes. Therefore, it would be against the public interest to permit the sale of school

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<sup>35</sup>(1859) 19 U.C.R.B. 28 (Ont.).





property upon execution. The statute provided other means whereby funds for necessary expenditures were to be raised, and if trustees wilfully neglected to exercise the powers vested in them for the fulfilment of any agreement, they could be held personally liable.

Burns, J., summarized the opinion by saying:

Looking at the whole of the School Acts, and the objects and intents for which the same have been enacted and the duties imposed upon trustees with regard to fulfilling of contracts made by them, and the power given them, enabling them to do so, the liability and responsibility cast upon them individually, if they neglect to perform their duty, I think the effect is to create these corporations for public beneficial and charitable purposes, and that the property should be held and administered for the ends and purposes for which it was given and held.

It is sufficient to hold in this action for ejectment, to recover the school house, that it is contrary to public policy to hold that property which is held for such purposes as this can be sold upon execution against the corporation. The corporation possibly may hold property, the uses of which might be appropriated for the maintenance of the school, and which it would be right to hold might be sold upon execution, but that is different from selling the school house itself, which is as much in daily use for the children of the section as the court house is for holding of the Courts, or the prisons for confining the prisoners of the counties, and I apprehend it could not possibly be held that these latter are liable to be sold upon execution.<sup>36</sup>

Logical as the preceding argument may be, it treats the matter with emphasis on what is favorable to the board and to the public. But the individual contracting with the board is also entitled to have justice done. The case of Lee v. Broley<sup>37</sup> treats the question from the latter point of view.

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<sup>36</sup>Ibid., at p. 34.

<sup>37</sup>(1909) 11 W.L.R. 36, 2 Sask. L.R. 298.



Froley had contracted with the North Battleford, Saskatchewan, School District to erect a school house. Lee was the heating sub-contractor. He completed his work and when Froley was unable to pay him, filed a mechanic's lien against the building and the land on which it was situated. He then brought action to enforce the lien and the trial Court ruled in his favor. The school board appealed.

The Appeal Court upheld the judgment of the lower Court.

Although it examined the Scott case, the Court did not consider itself bound by the Ontario authorities. Rather, Wetmore, C.J., said:

It seems very clear that, in the first place a school corporation is liable to be sued and is liable therefore, to have judgment against them, and is also liable to have execution realized with respect to its lands if it has not sufficient personal property to satisfy such an execution. It is equally clear, I think, that a mechanic's lien is in the same position; that is, the school trustees are a corporation and come within the definition of the word "owner" in the Mechanic's Lien Act. A lien, therefore, would attach against their lands, and the lienholder would have the same remedy for the purpose of enforcing his lien as he would against any other owner. Now it seems to me that, that being so, to lay down the rule that real property of a school district is exempt from either execution or attachment under a mechanic's lien would be disregarding the clear words of the Ordinance and Acts hereinbefore referred to...In fact, in my opinion, to do so would be to legislate.<sup>38</sup>

Had the legislature wished to exempt school property from seizure it could have done so, but had not. Further, the remedy given by Sec. 97 of The School Assessment Ordinance<sup>39</sup> providing that

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<sup>38</sup> 2 Sask. L.R. 288, at p. 293.

<sup>39</sup> 1901, C. 30, N.W.T.



Any writ of execution against the board of any district may be indorsed with a direction to the sheriff to levy the amount thereof by rate, and the proceedings thereon shall be the following...

was held to be unsatisfactory. The use of the word "may" was held to be permissive only and therefore not a substitute for the ordinary method of recovery. In equity to creditors, they must be able to recover by execution, for this is a right which has prevailed for centuries.

These two cases illustrate the effect of two differing provisions of statute and two opposing lines of reasoning employed by the two Courts. Quite apart from the actual judgments rendered, the cases illustrate the need for and operation of the doctrine of judicial precedent. It is conceivable that the two judgments might have been given in the same jurisdiction, were it not that Courts are bound by previous decisions, for the decision in each case is well supported. This would not, however, occur in practice, simply because of the operation of legal precedents. But because the two judgments were given in different provinces, the second Court was not bound by the first. The earlier case operated only as a persuasive precedent and its rule was rejected.

## VI. Summary

The Courts have held that because a school board is a corporation, school contracts are binding only if they have been drawn in compliance with all the requirements of the statutes. Otherwise





the contract is not enforceable against either party. The onus is placed upon the person contracting with the board to make sure that all the requirements have been met. Unless he does so, he may be without remedy.

According to the judgments rendered, school boards may not enter into contracts for school buildings until the necessary finances have been arranged, and they may not contract for a project beyond the funds which are available. If they do, the contract is ultra vires and not enforceable, and action may be initiated by a ratepayer to have repayment of all moneys wrongfully paid out under the agreement. In the employment of an architect prior to obtaining finances for construction, a board may engage him for preparation of sketch plans and estimates only. An architect can recover to that extent upon quantum meruit.

Contracts, the subject-matter of which is not permitted by statute, are prohibited. In this class are contracts for leasing school property whereby control is taken out of the hands of the board even temporarily. Nor may a board engage in proprietary activities even when this would be sound business procedure and economy. Trustees may not ordinarily contract with the board, but when such a contract is made in ignorance of the statute and to the benefit, rather than detriment of the district, the Courts are reluctant to penalize the offending trustees.

The school board, rather than the individual trustees, is liable in contracts which have been made in accordance with



statutory provisions. This is so even when the contract is inarticulately drawn. Further, the Courts hold that by virtue of the continuous succession of the board, the corporation is liable for contracts lawfully entered into by the predecessors of the present trustees.

Judgments indicate that unless legislation clearly provides otherwise, school property is subject to sale under the Mechanic's Lien Act of the province, or sale under a writ of execution.



## CHAPTER X

### LEGAL LIABILITY OF SCHOOL TRUSTEES

The subject of legal liability of school trustees, both in their corporate capacity and as individuals, is an extensive one, embodying liability in contract, general liability and liability in tort. The board's corporate liability has been referred to in various chapters of this study. It was introduced in Chapter III in relation to the board's status as a corporation. There were further implications of liability in chapters dealing with the board's relation to pupils and pupil conveyance. The board's liability in contract was developed in Chapter IX. This chapter considers chiefly matters of general liability both of the corporate board and of trustees as individuals.

#### I. Corporate Liability

This section of the chapter serves to do three things. It draws to a focus previous discussions of corporate liability of trustees; it completes considerations of such liability by giving attention to additional cases which could not be discussed conveniently in other sections of the study; and it serves to introduce individual liability of trustees and to distinguish it from their corporate liability. The brevity of the treatment of corporate liability is not an indication of limited importance. Rather it is





an acknowledgment that such liability has been a thread carried throughout the study.

### Liability of the Board Rather than of Individuals

In the normal course of the school board's operation, trustees act for the corporation and if liability attaches as a result of their actions, it is to the corporation. A number of cases have been cited previously on this point.<sup>1</sup> Similar rulings were handed down in the following cases.

In *Toronto Township v. McBride*<sup>2</sup> it was held that money loaned to trustees in their corporate capacity, and applied for the purposes of the corporation, could not be recovered in an action against the trustees personally. The board had determined to change the site of the school, in spite of local opposition, on the strength of an award of an arbitration board. Unknown to the trustees, the arbitration board had been irregularly constituted. The board applied to the township council for a loan and the council, unaware of the dispute with the ratepayers, granted the loan. When the money had been expended for the purposes of the district, action was brought against the trustees by the council on the grounds that the money had been obtained illegally and under false

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<sup>1</sup>For examples see pages 300-302 supra.

<sup>2</sup>(1869) 29 U.C.Q.B. 13.



pretenses. The Court held that the trustees, though mistaken, had acted in good faith and had borrowed and expended the money for school purposes only. Therefore any liability was that of the corporation.

In a Quebec case, *Bouchard v. Racine*,<sup>3</sup> plaintiff sought judgment against school commissioners personally for money spent before their budget had been approved as required by statute. The Court held that the action must fail. Commissioners had acted in good faith, though in ignorance of the statutory provision. Furthermore, said the Court, the mere provision that a budget must be submitted for approval and that it was not effective until approved, did not prevent payment of such current expenses as teachers' salaries, and expenses of plant operation. If there was any liability, it was of the corporation and not of the individual commissioners.

These cases indicate that when the board, acting in its corporate capacity and in good faith, mistakenly exceeds its authority, liability does not devolve upon the individual trustees. If rectification of the error must be made, it is the corporation which must do so. Trustees would not be personally liable for costs involved nor could they be held to have vacated their seats by their action, although it was an unauthorized action.

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<sup>3</sup>(1956) Que. Q.B. 217.



### Serving Notice of Action on the Corporation

As was pointed out in Chapter III, communications addressed to the corporation must be addressed to the proper officer. A New Brunswick Court<sup>4</sup> held this to be the case in legal actions against the board. When trustees are sued in their corporate capacity, notice of action served on the secretary of the board, is sufficient. When he is served, being an officer of the corporation, that is a service on the corporation.

### Payment of a Judgment Had against the Corporation

When a judgment involving money damages and court costs is had against the school board, how is it recovered? School statutes provide ways by which this may be done. Usually it is by a writ of execution and the amount is levied by an officer of the Court in the board's next annual requisition, if it has not been paid previously. Thus, in Richmond County School Trustees,<sup>5</sup> a judgment of \$743.75 plus costs was handed down against a Nova Scotia school board. When the board paid only \$90, the executors of the estate in whose favor the judgment had been given, demanded that the board make an assessment for the whole amount. The board took no action, whereupon the plaintiff applied for a writ of execution against the board.

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<sup>4</sup>Roberts v. Shediak School Trustees (1887) 26 N.B.R. 360.

<sup>5</sup> 14 N.P.R. 203, (1939) 4 D.L.R. 721.





The trustees, though notified of the action, did not appear to contest it, and the writ was issued so that the amount could be collected with other rates in the ensuing year, as provided by statute.

When such provisions are made in the School Acts, the function of the Court is chiefly to activate the process that has been set out. A school board officer, such as the secretary-treasurer, may be appointed the officer of the Court to carry out its directives and the action may be taken without the consent of the board. That is to say, the board may not interfere with or obstruct the proceedings. If it attempted to do so, trustees might be held in contempt of the Court.

#### Costs of a Groundless Action Against the Board

Legal action may involve certain expenses even when costs are assessed against the opposing party. It has been held that trustees defending themselves against a groundless action may be reimbursed from school funds, since such costs come fairly within the general term "expenses of the school". In Re Tiernan and Nepean,<sup>6</sup> a teacher sued the board for salary arrears which she alleged were due her. The Court held that her suit was unfounded

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<sup>6</sup>(1857) 15 U.C.Q.B. 87. (Ont.)



and assessed costs against her. However, since she had no money with which to pay the board's costs in the action, the trustees, instead of initiating a fruitless action against her, applied to the municipality for a special school rate to reimburse themselves for personal expenses incurred by the suit. The municipal council passed a rating by-law and a ratepayer moved to have it quashed.

The Court held that the rate was a legitimate one even though there was no explicit provision for it in the statute. The costs could reasonably be classed as an expense of operating the school system since they could not be recovered from the teacher. Because the trustees had not exposed themselves to the action by their own misconduct, they were entitled to be indemnified.

Thus, when the board as a corporation, or the trustees individually, are put to expense in defending themselves in a groundless action, they may be reimbursed with school funds. Ratepayers are liable for such costs as part of the costs of school operation. When the action against the trustees is justified, and the judgment is had against them personally, this principle does not apply as is shown in the next section.

## II. Personal Liability of Trustees

### Statutory Provisions

School legislation may make trustees personally liable for any or all of the following offenses which have been taken from representative sections of School Acts between 1950 and 1960.



- (1) Wilful neglect or refusal to exercise the corporate powers of the board in fulfilling its contracts or agreements;
- (2) Incurring liabilities in excess of those authorized by the Act, or for the appropriation of school money for unlawful purposes;
- (3) Neglect of, or refusal to perform a statutory duty;
- (4) Contracting unlawfully with the board;
- (5) Making false reports;
- (6) Neglecting or refusing to take security of the treasurer in the event of his defalcation. Trustees may be held personally liable to the extent of shortages in school accounts.

In addition trustees may be held personally liable for such breaches of the common law as acting in bad faith, in a discriminatory manner, or in abuse of their powers. Both Barga<sup>7</sup> and Lamb<sup>8</sup> have commented on this fact. The Courts are reluctant, however, to hold trustees individually liable and do so only on indisputable evidence. This attitude is aptly stated by Embury, J.:

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<sup>7</sup>P. F. Barga, Loc. Cit.

<sup>8</sup>R. L. Lamb, Loc. Cit.





It is a serious thing to hold...trustees individually responsible in a matter such as this. A trustee is a man elected by the ratepayers because they have confidence in him; and I must be satisfied that these men acted in bad faith, or at least wilfully, before I should be prepared to assess damages against them or give costs against them, or even to make an order against them, because an order for an injunction should go against the board of trustees and not against...individuals...<sup>9</sup>

### Defalcation of the Secretary-Treasurer

The following provision is representative of the statutory requirements for taking proper security from the board's treasurer, and the penalties for not doing so:

If a board refuses or neglects to take proper security from the treasurer or other person to whom it entrusts school moneys and any school moneys are forfeited or lost to the municipality, section or board in consequence of such refusal or neglect, every member of the board shall be personally liable for such moneys, and the same may be recovered by the board or any ratepayer interested therein suing on behalf of himself and all ratepayers in the municipality or section interested, in any court of competent jurisdiction; but no member shall be liable if he proves that he made reasonable efforts to procure the taking of such security.<sup>10</sup>

The case of Vaughan School Section v. Scott<sup>11</sup> proceeded on a similar section of school law. The secretary-treasurer of the school board was discovered to be short \$1,600 in his accounts in 1929.

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<sup>9</sup>Bowman v. Faber (1919) 3 W.W.R. 755 at p. 757.

<sup>10</sup>The Public Schools Act, R.S.O. 1950, C. 316, s. 143, as amended by 1951, C. 73.

<sup>11</sup>(1932) 41 C.W.N. 149.



To make restitution, he paid back \$400 in cash and gave his note for \$1,200. He paid \$250 on the note but made no further payments after February, 1931. New trustees were elected in December, 1930, and they brought suit to recover from the former board members. The Court held that through their refusal or neglect to require the secretary-treasurer to give adequate security, the members had indeed made themselves personally liable. However, when the action was not brought until 1931, though the neglect or refusal had arisen on the default of the secretary-treasurer in 1929, the action came too late, as provided by The Public Authorities Protection Act. That Act requires an action against a public authority, which includes a school board, to be brought within one year (six months in Alberta) from the time the cause of action arose.

The early Ontario case of Hamilton Township School Trustees v. Neil<sup>12</sup> involved a similar situation. Trustees had neglected to obtain a surety bond from their secretary-treasurer as required by law. When he later absconded with school funds placed in his keeping by the township council, the trustees attempted to escape liability by arguing that the secretary-treasurer had never been regularly appointed and therefore the council had had no right to pay any money to him. Money paid to him had not been placed into the proper hands.

Though it was true that there was no written appointment of the secretary-treasurer, the evidence showed that he had acted as

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<sup>12</sup>(1881) 28 Gr. 408



such for about two years. The Court held that there is a presumption that an officer of a corporation has been regularly appointed when he acts as such and is recognized by the corporation as that officer. His acts will bind the corporation even in the absence of written proof of his appointment.

Thus, the board had neglected to obtain security, the money had been turned over properly, the secretary-treasurer had absconded with it, and the trustees were held personally liable for the loss.

Cases such as those cited above are relatively straightforward, involving little more than the application of a clear statutory provision. Somewhat more involved is the case where the secretary-treasurer does give security when he is appointed, but the length of time of the bond is not specified. If such security is not renewed, are sureties liable in the event of defalcation? If they are not, trustees individually are held responsible.

Such a situation was treated in Waterford School Trustees v. Clarkson.<sup>13</sup> A secretary-treasurer was appointed by a public school board for a period of one year on condition that he give the necessary security. He did so, his sureties being two local persons. During each of the next two years he was reappointed in the same way and on the same condition, but fresh security was never taken, the board making no proper check that this was being done. Eventually

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<sup>13</sup>(1896) 23 O.A.R. 213 (Ont.).





he defaulted in respect of moneys received in his last year as secretary-treasurer. The board attempted to recover from the sureties, but the Court held that the original bond had been for one year only since that was the period of the appointment. Because the bond had not been renewed upon subsequent yearly appointments, sureties were not liable for default beyond the first year.

A similar judgment was given in Attorney-General v. Cameron,<sup>14</sup> a Nova Scotia case. Defendant had been appointed for one year in 1900. He gave security for the year. When he was reappointed in each of the following five years, the security was not renewed and sureties were held not liable for a shortage in the accounts for years after 1900. Trustees were held personally responsible for the amount in default.

Rulings in these cases, as well as the terms of the statutes, emphasize the need for careful and businesslike conduct of school board business. Bonding the secretary-treasurer is an elementary precaution which should be taken, and periodic checks to insure that the bond is in force is a matter requiring little effort. Failure to exercise such foresight may result in personal expense to trustees, for the money which may be lost, belongs to the school district and trustees are responsible for its safekeeping or proper expenditure. It is a trust for which they are personally responsible.

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<sup>14</sup>(1908) 43 N.S.R. 49.



Bad Faith and Wrongful Use of Powers

In the case of R. v. Green<sup>15</sup> the school board was censured because it refused to convey children on the pretext that they lived two feet less than a mile from school when the Act required conveyance only if they lived more than a mile away. Court costs were assessed against the trustees individually because they had acted with malice and in bad faith toward the family affected.

Persons who purport to act as trustees when in fact no legal district has been formed may also be made personally liable for improper use of authority. This was held in MacDonald v. Brown,<sup>16</sup> a Saskatchewan case. A school district had been formed in 1895 and trustees had been elected. However, no annual meetings had been held until 1906, and in fact, the district was not active in any way. At that time a group of local people petitioned to form a new school district. Without following proper procedures, they met, elected trustees for the new district, and passed a debenture by-law. Plaintiff and others objected to the proceedings, arguing that the proper course was to reactivate the old, existing district. When the plaintiff refused to pay the tax levy imposed by the new "board", his horse was seized on a distress warrant. He brought action maintaining that the "trustees" had no right to tax him because they were not in fact trustees and, in any event, not of the district in which he resided.

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<sup>15</sup>See p. 230 supra.

<sup>16</sup>(1910) 12 W.L.R. 713.



The Court held that no school district had been formed and therefore, no trustees could be elected. Those purporting to be trustees were actually usurping office and therefore must be held personally liable for the legal consequences of their conduct.

It was also held in Picton County School Trustees v. Cameron<sup>17</sup> that trustees carrying out illegal actions in the guise of their offices, thereby ceased to act as a corporation and exposed themselves to personal liability. Thus, when two trustees entered upon school premises and illegally moved the school house, they ceased to be trustees and became trespassers. On the old principle of law that when a person enters on property under authority of law and is guilty of abuse, he is considered to be a trespasser from the beginning, they were personally liable for trespass.

Hence, malicious or discriminatory use of power by trustees removes them from the protection of membership in a corporation. Since the corporation as a legal entity cannot act in such a manner, the acts become those of the individual trustees and they become personally liable.

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<sup>17</sup>See p. 103, supra.





### Other Illegal Actions

Wrongful Exclusion of a Child from School. In the case of Wilkinson v. Thomas,<sup>18</sup> trustees who, contrary to statute, refused to admit a child to school when she attained school age during the school term, were held personally liable for costs of the action. The Court stated that in matters so important as the child's right to education, trustees should consult their legal advisers to ascertain the legal implications of their proposed action. Not having done so, these trustees had exposed themselves to the penalties of their own actions.

Illegal Contracts with the Board. Trustees who enter into illegal contracts with the board may be held personally liable. Subject to such exceptions as are outlined on pages 296-299 above, or allowed by statute, members may not contract with the board. This was held in Huirhead v. Bullhead Butte School District,<sup>19</sup> where trustees employed themselves in construction of a new school house. When a ratepayer complained of this action to the Department of Education, the Deputy-Minister notified the trustees that they had disqualified themselves from office. He advised that they should vacate their seats and call a new election. Instead of doing so, they proceeded to levy a school rate which was illegally set so high that it would yield enough revenue in one year to provide for two years' operation. In the legal action which resulted from such

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<sup>18</sup>See p. 296, supra.

<sup>19</sup>(1911) 1 W.W.R. 253, 4 Alta. L.R. 12.



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behavior, the trustees were personally assessed for damages and court costs.

Employment of an Unqualified Teacher. School Acts require that only qualified teachers shall be employed by school boards. Failure to do so may result in severe personal penalties to trustees. In Stark v. Montague,<sup>20</sup> an early Ontario case, members of a board had employed an unlicensed person as a teacher. When they attempted to impose a rate for her salary, ratepayers resisted, and received judgment against the board in divisional Court. The trustees travelled to Toronto to appeal to the Chief Superintendent, who refused to interfere in the decision. They then imposed a rate to reimburse themselves for court costs and the cost of the trip to Toronto. Plaintiff refused to pay the rate and upon seizure of his goods, brought suit against the trustees. The Court held the trustees individually liable for all costs in both actions. Its reasoning was given by Robinson, C.J., who said:

We take it to be an acknowledged principle in regard to public officers, that when their conduct being complained of has been sustained as legal, they are admitted to have just claim to be reimbursed in any charges they may have been put to in upholding their authority by proving the legality of their proceeding; but where they violate the law, they are generally left to bear the consequences, and are not admitted to have a claim to be indemnified.

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<sup>20</sup>(1897) 14 U.C.Q.B. 473



The executive government of a county may have it in its power to indemnify its officers even in such a case, and may in some instances have found it just to do so, when the officer has acted under a sense of duty, in a case that admitted of doubt; but it would require the express provisions of an Act of Parliament, to authorize money to be levied upon a subject for the purpose of indemnifying a public officer or agent who has got into difficulty by violating the provisions of statute.<sup>21</sup>

#### Necessity of Proper Action Against Individual Trustees.

Although trustees may be made personally liable for court costs and damages in some circumstances, only the penalty provided by statute may be imposed in others. That is to say, when penalties for offenses are outlined by the Act, no other action may be brought for the same offense. This was held in Boutin v. MacKie,<sup>22</sup> a Saskatchewan case. For two years the Ethier School District employed a teacher of French extraction. Plaintiff's children complained that almost all instruction in school was in the French language, and the weight of evidence given in court, substantiated this charge. Because they had deliberately permitted the use of the French language in violation of The School Act, the trustees were summarily convicted and fined. They appealed from the conviction.

The Appeal Court found that they had indeed flagrantly and consistently violated the provisions of the Act. However, summary conviction was not the penalty provided by the statute. The proper

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<sup>21</sup>Ibid., at p. 475.

<sup>22</sup>(1922) 2 W.W.R. 1197.





remedy was for five ratepayers to apply to a judge for removal of trustees guilty of neglecting their duty. If five ratepayers were not to be found, as in the event of a community compact to operate in violation of the law, the proper course was to appeal to the Minister for an investigation. Thus, although there was no doubt about the trustees' having violated the Act, the conviction against them was quashed because it was an improperly brought action.

#### Recourse of a Trustee Convicted Personally

In the Ontario case R. v. Tucker,<sup>23</sup> it was held that a trustee who had been summarily convicted and fined for refusing to engage a teacher and provide school accommodation, was permitted to enter an appeal if he gave notice of his intention to do so immediately. In this case, defendant Tucker gave notice of his intention to appeal at the time that he paid the fine imposed by the Trial Court. Such an appeal is, of course, not possible when the Act specifically prohibits it. The Act in question, The Public Schools Act,<sup>24</sup> did not contain a prohibiting section and therefore the appeal was allowed.

### III. Summary

According to the judgments studied, when trustees act as a corporation, transacting the business of the corporation in good

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<sup>23</sup>(1905) 10 O.L.R. 506, 10 C.C.C. 217.

<sup>24</sup>R.S.O. 1897, C. 292.



faith and according to the provisions of the statutes, they are personally immune from legal action. The corporation itself is subject only to the ordinary liabilities imposed by the common law and by the statutes. That is to say, the corporation is bound to perform its duties as directed by law, or to discharge obligations which it has legally contracted. If contracts are properly carried out in the spirit of justice and equity and are within the powers of the board, no personal liability attaches to the trustees. Dispute may arise over interpretation of powers, or the provisions of the contract in question, and then the Courts may be asked to rule. But individual trustees are not held liable.

However, when there is evidence of bad faith, illegal action, neglect, wilful or malicious misuse of powers, trustees may be held individually accountable for their actions. Acts which are ultra vires the corporation and outside its capabilities to obligate itself, are acts for which it cannot be held liable. In other words, if a corporation is not permitted by its constitution to do a thing, it is presumed that it cannot have done the thing and of course, cannot then be held liable for the consequences. In such a case, if trustees have pursued a course beyond the powers of the school corporation, and have thereby caused injury or damage to others, they may be made personally liable for such injury or damage. Also, if the statute imposes a duty on the corporation, and trustees refuse or neglect to perform the duty, or do so in a negligent manner, they may be held personally responsible.



School trustees are not, however, subject to unlimited liability or irresponsible legal action. Actions against the corporation are often controlled by statutes which place limitations on the time within which they may be brought, or contain certain provisions which confer immunities on trustees. For example provisions of legislation such as Public Authorities Protection Acts extend to school boards and thus limit the time in which actions may be brought against boards. School Acts may also provide specific penalties for specific offenses and then only these may be imposed. Further, the Courts recognize the exposed position occupied by such public servants as school trustees and demand that charges against them be substantiated by clear and incontrovertible evidence. Thus, although they must use care in the performance of their duties, trustees need not hesitate to exercise their powers in new and imaginative ways because of fear of legal action against them.





## CHAPTER XI

### CONCLUSIONS AND IMPLICATIONS

Examination of the cases discussed in this dissertation leads to the conclusion that when the school statute is explicit in directing the organization or operation of the school board, there is no question as to what must be done, and the Courts will enforce the clear provisions of the legislation. When the statute is less clear, or indeed when it is silent altogether, the Courts may apply the rules of the common law, or they may seek to determine and implement the intent of the legislature. Throughout, they are concerned with seeing that the school board functions reasonably in achieving the purposes and objectives for which it was created.

The Courts have stated in the clearest of terms that the school board's primary concern must be the education of children. The interests of children are paramount, and all else is ancillary or contributory to the realization of such interests. Legally, responsibility for education has been assigned to the provincial legislatures by the constitution. The legislatures in turn, have created school boards to carry out the actual program of educating children. Although they have delegated much of the work of providing and operating schools, the legislatures retain the ultimate authority and responsibility in education. Therefore, school boards exist and function at the will of the legislature and are subject to its directives.



The will of the legislature is expressed in the School Acts of the various provinces. These Acts are the constitutions of school boards, granting powers and imposing duties. Boards must carry out those duties which are mandatory, and they may provide those services which are permissive. In doing either, they may exercise only those powers which are explicitly granted or reasonably implied by statute. When school boards exceed their powers, when they fail to exercise mandatory powers, or exercise powers negligently or in bad faith, they expose themselves to legal action and public censure. School trustees may not adapt or modify the provisions of the statute, for such power resides in the legislature only. The Courts have pointed out that boards may apply to the legislature for necessary changes, and in the event that they find it impossible to carry out the duties imposed on them by exercising only the powers which have been granted, they may resign and shift the responsibility for providing educational services back to the legislature.

Such drastic action as resignation of the school board because of inadequacy of legislation is, however, rare. A great deal of litigation involving school boards originates in imperfect understanding of the powers and status of the board, and of its functions in the pattern of local government. It has been the purpose of this investigation to examine and clarify this status by studying the decisions of the Courts in settling disputes involving educational matters.



The purpose of this chapter is to draw together some of the major findings. It must be pointed out that these findings should not be read in isolation from the body of the study for without supporting details, they may be erroneously interpreted, or there might be an unwarranted shift of emphasis. Furthermore, these findings should be read in connection with the pertinent statutes. As was pointed out in Chapter II, provincial School Acts differ materially in their provisions and therefore a judicial decision which is applicable in one or more provinces, may not be so in another.

## I. Conclusions

### The School Board as a Corporation

In every province the school board is established by statute as a corporation. As such, therefore, it is a legal person, separate from its members, and controlled by the statute which is its constitution. The board can operate only through corporate acts, unless the statute permits other ways of conducting its affairs. This means that business can be transacted only by the board, corporately assembled, and observing the formalities required by statute. Other modes of carrying out the board's functions are ultra vires and void, and cannot be enforced by or against the corporation.

Because it is an intangible body, existing only in contemplation of the law, the corporation can conduct its affairs and do its work only by means of agents, servants or contractors. To bind itself the





school corporation may enter into only those types of contracts permitted by statute, and by following the procedures laid down. Furthermore, the corporation is responsible for the manner in which its agents or servants perform the duties assigned to them.

Such provisions are entirely reasonable. The school corporation conducts public business, using public funds, and has certain extraordinary powers granted to it. To prevent improper use of public funds, statutes provide safeguards in requiring formal procedures for contracting, for borrowing, for raising money and for spending money. To insure that transactions will be directed toward the fundamental aim of educating children, the types of contracts which a school board may make are limited. To insure that powers will not be used excessively or abusively, the corporation is made responsible for the behavior of those who act for it.

The internal regulation of the school corporation is governed by statute. Thus membership in the corporation, its meetings, and by-laws are subject to the provisions set down by the legislature. Where the statute does not specify procedures to follow, or penalties to impose when its provisions are violated, the Courts have applied the common law to give redress to injured parties.

Although the school board has been granted wide powers to enable it to provide educational services, its powers are distinctly limited. The board can engage in only those activities which contribute to the end of educating children, and has no other powers, even though other types of activity may be sound business if done by a private individual



or by a trading corporation.

### School Board-Municipal Council Relations

The school board is only one of the corporations created by the legislature and assigned local government functions. The most important of the other local authorities is the municipal corporation, and because the legislature has ordained that the school board must work in close relationship with the municipal council, it has been necessary to define the limits of authority granted to each and how each shall function in relation to the other. The Courts have held that within the ambit of its authority, each is supreme, and neither may invade the jurisdiction of the other. Each has its own constituency to which it is responsible, and although these constituencies may overlap, they are not necessarily identical, especially where there are separate schools, or where there are high school boards as well as boards of elementary schools. Therefore, neither should act for the constituents of the other. Thus when the legislature assigns to the municipal corporation certain ministerial functions to be carried out on the proper requisition of the school board, the municipal council has no discretion in the matter.

Such ministerial functions typically include the collection of school rates on the board's requisition, and, in some provinces, issuing debentures on application from the board. The Courts have ruled that when the school board is given power to requisition on the municipal council for funds, the municipal council is merely a tax-gathering machine for the school board. The legislature, they hold, has



provided this method of tax collection for the convenience and economy of the ratepayers. Merely collecting taxes for the school board does not give the council special privileges or special powers over the board. The board itself is still responsible for the school rate even though it does not collect it.

One cannot help but conjecture that much school-municipal friction arises because of a misunderstanding of this elementary principle. If the board requisitions in good faith, at the time and in the manner provided by statute, the council has no power to refuse, though where the legislation provides for arbitration of disputes on requisition, the ruling of the arbitrators may be final, and then neither board nor council has any further discretion. It might be suggested, however, that such arbitration procedures should be reserved for cases of excessive requisition or requisitions suspected to be in bad faith. They should not be made an instrument for restricting the activities of the school board.

The Courts have held that money raised for school purposes, either on requisition or by debentures, must be used for school purposes. Furthermore, money obtained from public school supporters must be used exclusively for public school support. Otherwise, were such money used for municipal purposes, money obtained from one constituency would be used for the benefit of another, with resulting inequity and confusion. Therefore, surpluses on requisition should be held in trust by the municipal council to be applied to the succeeding year's school requisition.





When the school board is engaged in activities clearly within its statutory authority, the Courts have held that it is by no means subject to direction by the municipal council. Thus, in matters of school operation and maintenance, school transportation, relations with its employees, the board is supreme. It is not a junior partner in matters of local government.

#### Additional Considerations in School Finance

If the school board is not subject to direction or control of the municipal council, it follows that the board may not interfere with the council either. The Courts have held this to be especially so where the school board requisitions for funds. When the council has paid over the complete requisition, the board's discretion ends, and it may not direct how the council shall obtain the money.

The board's lack of control over how school requisitions are to be met can raise a serious problem. When industrial enterprises are encouraged by tax concessions or fixed assessment agreements to establish themselves in a community, such enterprises may increase the need for school services by attracting large numbers of workers. The increased school services require increased amounts of money, for which the industry, because of the tax agreement, pays less than its fair share. The added costs are therefore shifted to other ratepayers who are then required to pay more than they otherwise would. In effect, school taxes may be increased by action of the municipal council without the consent of, or a requisition from, the school board. The question of responsibility for such an action has not been resolved.



It has been stated by the Courts that municipal councils have no authority to levy for school purposes except on the board's requisition. This points up the necessity for school requisitions being submitted on or before the date laid down by statute, for the Courts have also held that, subject to the statutes, councils may be able to make only one levy in any one year.

Statutes make no provision for boards to provide finances far in advance of actual needs. Therefore, boards have not been permitted to requisition for interest on debentures to be issued later during the year. Nor has raising money for districts yet to be formed been permitted.

Since taxing statutes permit a degree of interference with individual property rights, they are strictly construed. While the taxing authority may operate to the limit of the statutory provisions and obtain full benefit of the powers granted, it must follow the provisions carefully.

The borrowing powers of the school board are carefully delimited by statute. Whether borrowing is done by application to the municipal council, or requires approval of another outside body, statutory procedures must be followed. Once having borrowed, the school corporation cannot escape liability for repaying the money. Even a change in, or dissolution of, the corporation does not absolve it of this liability. However, if the board borrows beyond what it is authorized to borrow, the lender may be without remedy, unless his money is used to pay the legitimate debts of the district. Then the lender may take the place of former creditors and recover to that extent.



### The Board in Relation to Pupils

It has been established that the legislature of each province has granted children a statutory right to education. This right is the right of the child himself and is not subject to the wishes and convenience of parents, guardians or school boards. The granting of such a right places the obligation to provide facilities for its realization upon the authorities. School boards have such an obligation placed upon them and the Courts have consistently ruled that they must discharge their obligations faithfully, without discrimination and in the interests of all children within their jurisdiction. The manner of providing educational facilities, however, is at the discretion of the board. Trustees may operate a school in the child's neighborhood; they may convey the child to a more distant school; or they may make arrangements to board the child near a school. Whatever the arrangements, however, the board must not discriminate against any children.

The child's right to education, and consequently the board's obligation to provide, is not absolute. Provincial statutes lay out the conditions which the child must meet in order to qualify for education. Chief among these qualifications is the matter of residence. Others include age, health and adherence to proper conduct. Subject to the provisions of the statute, children may be excluded from school because of misconduct or refusal to observe provincial health laws regarding immunization. When the child's right to education is sought to be altered, however, strict adherence to the statutory





procedure is required.

School boards have the right to direct which school a child shall attend within the district. The Courts have held that in this way the public interest can best be served, and confusion avoided.

### Pupil Transportation

Centralization of schools and the elimination of small school districts, especially in rural areas, has tended to place schools at some distance from the homes of children. It has therefore become necessary for boards to provide conveyance for such pupils, to enable them to receive education. When the statute imposes a mandate on the school board to transport pupils, no problem exists regarding the costs involved. They become part of the annual requisition. However, the Courts have held that where conveyance was provided at the board's discretion, the costs incurred could also be considered a part of the cost of school operation and maintenance.

Although boards may be required to provide conveyance, the Courts have refused to interfere with their discretion in laying out transportation routes, when this was done in good faith. Discrimination or bad faith in the discharge of the duty to convey pupils, receives severe censure. Individual trustees acting in bad faith have been held personally liable for court costs and damages.

Because transportation increases the risk of injury to children, the further duty of taking care to prevent injury is imposed on school boards. The board has been held to be justified in dealing



strictly with irresponsible drivers. In case of accident, the board may be liable in damages depending upon the circumstances. When conveyance is imposed as a statutory mandate, the board cannot escape liability for the negligence of either its own servant or that of an independent contractor. If provision of conveyance is a discretionary power, the board is liable only for the acts of its servants and not for those of an independent contractor or his servants.

### School Premises

By providing school premises, the board partially discharges its obligation to provide educational facilities. Hence it has certain powers granted by statute. Much of the litigation arising from dispute over school sites results from the board's failure to follow statutory provisions, or from misinterpretation of the statute.

Among the board's powers is the right of compulsory acquisition of land for school purposes. The Courts have indicated that since the exercise of such an extraordinary power interferes with individual property rights, the requirements of the legislature must be carefully followed. In exercising this power, the board has been required to follow precisely the statutory requirements. It has also been held that the power of expropriation may not be exercised against another body which also has that power, for the result might be a series of confusing cross-expropriations.

Where the board provides temporary accommodation by renting community or church facilities, the payment of rentals has been held



to be a proper expenditure of school funds. Nor, when church facilities are used, is such provision related to religious education. If a board finds it necessary to add to an existing school, it has been held to be free from municipal building restrictions, though it is subject to other municipal regulations or by-laws.

### School Board Contracts

To make a binding contract the board must observe all the statutory requirements. These requirements usually include such things as corporate action of the board, a duly assembled meeting called on proper notice, or formal waiver of notice when a meeting is irregularly convened. If the formalities are not observed, the contract may be unenforceable by or against the corporation.

It has been held that school boards may not contract for school construction before the necessary funds have been made available. The Courts hold that it is beyond the powers of the board to bind the district in this manner, thereby forcing ratepayers to acquiesce in the wishes of the board. Nor may school boards contract beyond the amounts provided for particular projects. Rather, they are required to obtain money by procedures outlined by the statute. If boards are unable to obtain sufficient money by observing such procedures, they must curtail their plans. Trustees may not circumvent the statute by including large capital cost items in their requisitions for current expenditure, or otherwise. To assist in estimating the amounts required, boards may employ architects to draw up estimates and sketch plans. It has been held, however, that complete plans and





specifications may not be contracted for until the necessary finances have been approved and arranged.

Because school boards are not considered to possess proprietary powers, the Courts have held that they may not lease school property for revenue purposes or otherwise when this means that control passes out of the board's hands, even temporarily. It has also been held that even the renting of surplus school property for purposes of defraying other school costs--in spite of the fact that this might be sound business practice--is beyond the powers of the board. When statutes specify that the board may dispose of surplus property "by sale or otherwise" this phrase has been held to mean a transfer of title.

When trustees act as a corporation, and contract on behalf of the corporation, it is the corporation, and not the trustees, which is liable. However, individual trustees who contract with the board of which they are members may disqualify themselves and expose themselves to the penalties provided. The Courts permit some exceptions to this rule. Thus when the contract is made in ignorance, or when the district benefits, actions against trustees have been dismissed. Although the pertinent statutory provisions were ostensibly passed to prevent loss to the school district through the improper use of a trustee's position, trustees should avoid contracting with the board. Such contracts, even those made in innocence or with good intention, may throw school administration into bad repute and thereby do damage to the cause of education in the community.



School boards may demand performance bonds from contractors, but the contract must be clear in stipulating the kind of bond required. Boards may be prevented by the Courts from altering bonding requirements after the contract's conditions in that regard have been satisfied, and the board may be liable in damages for not permitting work to proceed under the unsatisfactory bond. Authority is divided on whether school buildings are subject to mechanic's liens or writs of execution, but in any event, this matter is usually controlled by statute.

#### Legal Liability of School Trustees

Although it is the corporation which is liable in cases where trustees have clearly acted for the corporation, trustees themselves may be individually liable in a number of instances. The statute may provide for such liability when trustees wilfully act outside its terms. Thus, if the board is required to take proper security from its treasurer and refuses or neglects to do so, trustees may be individually liable in the event of his defalcation. Further, trustees may expose themselves to personal liability if they act in bad faith, contract illegally with the board, or abuse their powers.

In general, however, trustees holding public office come within the provisions of Public Authorities Protection Acts. The Courts recognize the fact that such persons are sometimes unjustly exposed to public criticism, and are therefore reluctant to find against trustees personally. When the evidence is clear, there is



little alternative, but this fact should not discourage trustees from acting vigorously and imaginatively in administering their schools.

## II. Implications for Administrators

As was emphasized in the introductory chapters of this study, school administrators should be legally literate. One way for trustees to become more competent is to study provincial school statutes. Such study alone, however, is not sufficient. The study of Court decisions too helps to give insight into the everyday operation and application of legal provisions. Knowledge of what the Courts have held is of considerable value in clarifying what the administrator may or may not do.

Throughout this investigation, the writer has found that the Courts speak with great clarity in defining the board's rights, powers and duties. In doing so they convey the impression that school boards are by no means inferior bodies in local government. If boards have found their powers eroded by legislative restriction in favor of municipal governments, they must accept a considerable measure of responsibility for this themselves, for they have lost influence by default. They have not exercised their statutory powers to the limit. Nor have they been vigorous enough in defending their rights, or aggressive enough in obtaining extensions to their powers.

By becoming more conversant with case law and the interpretation of statute, administrators can advise their boards more effectively. It is only through such effective advice and vigorous administration





of schools that boards will be able to cope with the complexities of their tasks in the future. One might conjecture that only such a high quality of school administration will insure the continued existence of local, fiscally independent school boards. Failure to administer effectively could easily result in school boards being absorbed by municipal governments, in which case education would lose its present identity in local government.

The quality of administration is closely linked with the conceptual skills of the administrator. The study of school law can add much to these conceptual skills. In the purely practical realm, knowledge of the law can save school boards money and inconvenience. Court costs and damages are frequently the penalties paid for ignorance of the statute, or of the provisions of the common law, and irksome delays are the result of improperly complying with the statute.

However, administrators should not be concerned only that an action be legal. School administration is more than mere adherence to the law. Though it may be permitted by statute, an act may not be in the best interests of the schools or the community. An action which, though legal, may do damage to the cause of education or to the interests of children, might better be left undone. The study of school law can only help to improve school administration by clarifying some of the factors of the situation in which the school administrator works.



### III. Implications for Further Research

A number of the delimitations which were necessary in this study present problems for further research. The first of these is an examination of the legal implications arising out of the relation of the school board to its employees. The primary purpose of such a study would be to establish the legal status of the public school teacher. It would also, of necessity, give some attention to the powers and duties of the board in relation to teachers.

The study of separate schools in Canada could very well be undertaken along lines similar to those of this dissertation. Many of the findings derived from litigation involving separate school boards would, no doubt, have implications for public school people as well, just as the findings of this study have implications for separate school boards.

A number of studies whose emphasis would be mainly historical could grow out of this investigation. Among these would be studies to trace legislation dealing with specific aspects of school statutes such as the development of school taxation and finance, teachers' contracts and the growth of teacher organizations, provisions governing school district boundaries, and the history of school-municipal relations. Studies such as these would involve, in addition to examination of reported cases, a search of the statutory provisions and study of social and economic factors which may have influenced the developments.



The whole question of tort liability of school boards, their servants and their agents might be investigated further. Attention has been given to the tort of negligence in studies which have been done, but the need for further research in regard to other torts is indicated.

While this study has examined the decisions of the Courts on what school boards have done, and has made certain observations on what they should do, it would be pertinent to have a study of what boards actually do at the present time. Such research would reveal many practices which have not been before the Courts. It would be of value to examine what is being done in the light of what the Courts maintain should be done.





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| <u>Abbreviation</u> | <u>Report</u>              |
|---------------------|----------------------------|
| Alta. L.R.          | Alberta Law Reports        |
| B.C.R.              | British Columbia Reports   |
| C.C.C.              | Canadian Criminal Cases.   |
| D.L.R.              | Dominion Law Reports       |
| Gr.                 | Grant's Chancery Reports   |
| Man.R.              | Manitoba Reports           |
| M.P.R.              | Maritime Provinces Reports |
| N.B.R.              | New Brunswick Reports.     |
| N.S.R.              | Nova Scotia Reports        |





AbbreviationReport

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|            |                               |
|------------|-------------------------------|
| O.A.R.     | Ontario Appeal Reports        |
| O.L.R.     | Ontario Law Reports           |
| O.R.       | Ontario Reports               |
| O.W.N.     | Ontario Weekly Notes          |
| O.W.R.     | Ontario Weekly Reports        |
| Que. K.B.  | Quebec King's Bench Reports   |
| Que. Q.B.  | Quebec Queen's Bench Reports  |
| Que. S.C.  | Quebec Superior Court Reports |
| R.L.       | Revue Légale                  |
| Sask. L.R. | Saskatchewan Law Reports      |
| S.C.R.     | Canada Supreme Court Reports  |
| Terr. L.R. | Territorial Law Reports       |
| U.C.C.P.   | Upper Canada Common Pleas     |
| U.C.Q.B.   | Upper Canada Queen's Bench.   |
| W.L.R.     | Western Law Reporter          |
| W.W.R.     | Western Weekly Reports.       |

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Toronto Township v. McBride (1863) 29 U.C.Q.B. 13.

Vaughan School Section v. Scott (1832) 41 O.W.N. 149.

Waterford School Trustees v. Clarkson (1846) 25 O.A.R. 213.



## APPENDIX A





## GLOSSARY OF LEGAL TERMS

The following is a list of legal terms commonly used. The terms have not been rigorously defined. Rather, an attempt was made to express the general meaning in every-day language. The terms have been collected from a number of sources and the accuracy of the meanings was checked in the following legal dictionaries:

Earl Jowitt, The Dictionary of English Law. London: Sweet and Maxwell, Ltd. 1959.

John Burke (ed.) Stroud's Judicial Dictionary. London: Sweet and Maxwell, Ltd. 1952.

Action: An ordinary proceeding in a court by which one party prosecutes another for the enforcement or protection of a right, the redress of a wrong, or the punishment of a public offense. In common language, a lawsuit.

Allegation: A statement in pleadings, setting forth what the party expects to prove. A statement of fact in any proceeding.

Appellant: The party who takes an appeal from one Court to another. The party resisting the appeal is called the respondent.

Avoid a Contract: To cancel and make the contract void.

Breach of Contract: Failure without legal excuse to perform part or all of a contract.

Citations: References to law books. A citation includes the name of the book where the reference is found, the volume number, the section and page numbers.

Citations, judicial: References to Court decisions. Citations in the case materials include all the sources in which the case may be found.

Civic Law: The law dealing with relations between private persons as distinguished from criminal law.



Code: A compilation of statutes, scientifically arranged into chapters, subheadings and sections, with a table of contents and index. A collection or system of laws.

Codification: The process of collecting and arranging the laws of a state into a code. The collection of all principles of any system of law into one body.

Collateral Attack: An attempt to destroy the effect of a judgment by reopening the merits of a case or by showing reasons why the judgment should not have been given.

Consideration in Contracts: The inducement, usually an amount of money.

Contract: An agreement upon sufficient consideration, to do or not to do a particular thing; the writing which contains the agreement of the parties, with the terms and conditions, and which serves as proof of the obligation.

Damages: Pecuniary compensation or indemnity which may be recovered in court by the person who has suffered loss or injury to his person, property or rights through the unlawful act, or omission of another.

Deed: A writing whereby an interest, right or property passes or an obligation binding on some person is created or which is in affirmance of some act whereby an interest, right or property has passed.

De Facto Officer: One who is in actual possession of an office without lawful title.

De Jure Officer: One who has just claim and rightful title to an office, although not necessarily in actual possession thereof.

Defendant: The party against whom relief or recovery is sought in a court action.

Defense: That which is offered and alleged by the defendant as a reason in law or fact why the plaintiff should not recover.

Demurrer: Allegation by one party that the other party's allegations may be true but, even so, are not of such legal consequence as to justify proceeding with the case.

Directory: A provision in a statute which is merely an instruction of no obligatory force and involving no invalidating consequences for its disregard.



Divisible Contract: One which can be separated into two or more parts not necessarily dependent on each other nor intended by the parties to be so.

Ejusdem generis: Of the same kind, class or nature. In statutory construction the ejusdem generis rule is that, where general words follow an enumeration of words of a particular and specific meaning, the general words are not interpreted in their widest sense but as applying to persons or things of the same general kind or class as those specifically named.

Ex post facto: After the fact. An ex post facto law is one passed after an act which retrospectively changes the legal consequences of the act.

Executed contract: A completed contract as opposed to one which is executory. E.g. a purchase paid for on the spot and goods immediately delivered, represents an executed contract.

Executory contract: An incompletely performed contract with something yet to be done in the future. E.g. a promise to build a house in six months.

In loco parentis: In place of the parent. Charged with some of the parent's rights, duties and responsibilities.

Indivisible contract: One which forms a whole, the performance of every part a condition precedent to bind the other party: as opposed to a divisible contract which is composed of independent parts the performance of any one of which will bind the other party as far as it goes.

Injunction: A prohibitive writ issued by a Court of Equity forbidding the defendant to do some act he is threatening, or forbidding him to continue doing some act which is injurious to the plaintiff and cannot be adequately redressed by an action of law.

Injury: The infringement of some right.

Laches: Omission to assert a right for an unreasonable and unexplained length of time, under circumstances prejudicial to the adverse party.

Liability: Legal responsibility. Being actually or potentially subject to an obligation.

Mandamus: A writ to compel a public body or its officers to perform a duty.





Pleadings: Formal papers filed in a court action including complaint of the plaintiff and the defendant's answer, showing what is alleged on one side and admitted or denied on the other side.

Quantum Meruit: An implication that the defendant had promised to pay plaintiff as much as he reasonably deserved for work or labor.

Quo warranto: A method of trying title to a public office.

Relief: The redress or assistance which a complainant seeks from the Court.

Stare Decisis: The principle that when a Court has made a declaration of a legal principle it is the law until changed by competent authority: upholding of precedents within the jurisdiction of the Court.















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